Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

JOINT COMMENTS OF WORLDCOM, INC., THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, AND THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, the Commission's Notice of Proposed Rulemaking of February 15, 2002, in the above matters,[1] and the Commission's Public Notice of February 28, 2002 (DA 02-485), WorldCom, Inc. ("WorldCom"), the COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ("CompTel"), and the Association for Local Telecommunications Services ("ALTS") submit these comments.

[1] *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019 (2002) ("*Notice*" or "*NPRM*").

INTRODUCTION AND EXECUTIVE SUMMARY

At the behest of a company that owns almost 40 percent of the nation's bottleneck access lines,[2] the FCC has convened one of the most startling rulemaking proceedings in its 68-year history. It proposes to permit the ILECs to bar competitors' access to those lines when the ILECs use them to provide "information services." Since future communications likely will be provided in conjunction with what the Commission chooses to label as "information services," and since the ILECs today routinely bundle information services and other enhanced services with their telecommunications offerings, what the Commission is really proposing is nothing less than overturning the statutory structure governing the nations' last-mile transmission infrastructure. The Commission's proposal is bad policy and legally unsustainable.

The *NPRM* is candid about the radical nature of the rules it proposes and the questions it asks. It asks whether the access rules set out by Congress in the 1996 Act can be avoided through the artifice of labeling telecommunications access services "information services." It asks whether its own 20-year-old "*Computer Inquiry*" rules providing open access to transmission facilities should be abandoned. Finally, it asks whether the 500-year common-law tradition of "common carriage" has outlived its usefulness as it would apply to the next generation of communications services. No wonder *Business Week* finds this *NPRM's* efforts "extending the Bell's monopoly power"

[2] *See NPRM* ¶ 26 n.61; Statistics of Communications Common Carriers, 2000/2001 Edition, Table 2.6.

to be "dumbfounding" and a "betray[al] [of the Administration's] conservative principles [that] undermine[s] the long-term strength of the economy."[3]

The mechanics of the FCC's proposals are as unsound as their purpose. In the FCC's proposal, bottleneck transmission facilities lose their common carriage characteristics whenever the ILEC unilaterally chooses to bundle those facilities with information services – or to sell those services only to companies that in turn provide information services. The FCC would accomplish this result by placing talismanic significance of its previous statements that something could not be a "telephone service" and an "information service" at the same time – statements the FCC had always been careful to qualify by saying they could not be applied precisely in this context. But whether or not Internet access service is an "information service," and whether or not it cannot also be a "telecommunications service," the nature of a bottleneck transmission facility is not changed depending upon what the owner of that facility chooses to transmit over that facility. The FCC does not practice alchemy. Neither is the FCC's proposed principle limited to broadband services. The ILECs' POTS (plain old telephone service) services all can be bundled with "information services" such as voice mail. If the FCC's proposal were adopted, through the simple expedient of offering voice mail with all of its telecommunications services, the ILECs could be seen as ceasing to offer "telecommunications services" altogether.

Both competitive information service providers and competitive telecommunications providers are dependent upon the ILECs' last-mile bottleneck facilities. Millions of consumers find it valuable to purchase service from these

[3] Editorial, *Things We Don't Like*, Bus. Wk., Mar. 18, 2002, at 114.

competitors. The *NPRM* threatens to extinguish these existing competitive services in the name of promoting something that exists only in the imaginations of regulators in search of the new thing – bigger and better "broadband" last-mile facilities that the ILECs claim they would deploy if they were deregulated. But there is no reason to believe that the demand for these services has outstripped supply, and certainly no reason to believe that deregulating the ILECs will spur them to deploy these or any other facilities. A rule that threatens existing competitive services in the name of promoting the current Commission's "central communications policy objective of the day"[4] is a bad rule. It is a surrender to monopoly blackmail.

An *NPRM* raising fundamental questions deserves equally fundamental responses. Since this is the first time, to our knowledge, that the FCC has considered labeling virtually the entire telephone infrastructure "private carriage," we begin our comments with a discussion of the principle of "common carriage," how and why it was developed, and why it should continue to apply to the tens of billions of dollars' worth of copper and fiber lines that interconnect every home and business in this country. We explain that unless this infrastructure remains "common carriage," ILECs would be free to engage in the kind of discrimination that would strike at the heart of the public switched telephone network. For example, the newly labeled "Verizon.net" could enter into a marketing deal with one retail business and agree to refuse to interconnect with any of that business' competitors. When Verizon uses Internet-based services to provide telecommunications, its unfortunate residential customers would be able to call only one retail company on

[4] *NPRM* ¶ 1.

their phones. Common carriage principles were created to prevent just such harmful abuses of the network, and the Commission should not abandon those principles here.

We then will demonstrate as a matter of fact that today the ILECs' last-mile facilities remain bottleneck facilities. We show that monopolists that control bottleneck facilities, left to their own devices, will leverage that bottleneck control onto downstream markets. This is a structural problem that cannot "be addressed through private unregulated contractual arrangements or other marketplace solutions."[5] We will explain that whatever competition exists in the network today has come about as a result of legislative, regulatory and judicial oversight, and that deregulation has never led to the erosion of a bottleneck monopoly. The breakup of the Bell System and the Commission's *Computer II and III* rules did not deter innovation, but unleashed it. Remonopolization will not "foster investment and innovation,"[6] but will throttle it.

We then discuss the particular competitive services threatened by this *NPRM*. We show how consumers have benefited from competition among ISPs. We show that the ILEC ISPs already limit the kinds of services they provide in ways that benefit the ILECs' monopoly, but that disserve the public.

Next we address the Commission's questions relating to the ILEC's obligations to provide bottleneck transmission facilities to its retail and wholesale customers. Because the legislative rules adopted by Congress in the 1996 Act grew out of the framework established in the *Computer Inquiry* cases, we start with the Commission's questions about the continuing relevance of those cases.

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[5] *NPRM* ¶ 52.

[6] *NPRM* ¶ 5.

We then address the Commission's tentative conclusions that the ILECs do not provide common carrier telecommunications services when they offer ISP services using their own bottleneck facilities. In particular, we show that while ILEC-provided Internet access services may well qualify as "information services," that does not mean that the underlying transmission services upon which those information services ride are not "telecommunications services." Internet access service providers are *purchasers* and users of telecommunications services, even if they are *providers* of information services. This distinction between use and provision is critical, and does not change when those telecommunications services are self-provided. Nor is it "radical surgery"[7] to insist that the nation's transmission facilities be open for everyone to use on a nondiscriminatory basis. Rather, it is the FCC's stated intention to cut the "public" out of the "public switched telephone network" that is radical surgery.

In any event, even if the ILECs' bottleneck facilities were mistakenly categorized as "private carriage" or "information services," this does would change the fact that competitors themselves retain their full rights to use these same copper and fiber last-mile facilities to provide "telecommunications services." Under the Act's relevant definitional provisions and section 251(c)(3), it is the nature of the services that competitors wish to provide, and not the services that ILECs choose to offer, that trigger the Act's unbundling requirements. The Commission's efforts to avoid the requirements of section 251 therefore are for naught.

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[7] *In re Inquiry Concerning High-Speed Access on the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC No. 02-77, ¶ 43 (re. Mar. 15, 2002) ("*Cable Declaratory Ruling*").

Next we show that the Commission's proposal to shift the regulation of the telephone network out of the Commission's Title II jurisdiction as circumscribed by Congress in the 1996 Act, and into the Commission's Title I "ancillary" jurisdiction, would be both misguided and unlawful. Any such effort would be seen by the courts for what it would be: an unlawful attempt to evade legislative mandates with which the Commission disagrees. The Commission's Title I jurisdiction can be invoked only to protect matters subject directly to the Commission's jurisdiction under other titles of the Communications Act. The Commission cannot at once attempt to empty Title II of all substance and then claim the right to regulate under Title I to protect a vessel it has emptied. Moreover, any attempt to regulate Internet access service exclusively through Title I would have the undesirable effect of denying the states their traditional role in the regulation of local retail services and their role in implementing the provisions of the 1996 Act.

Finally, we address the universal service questions posed in the *NPRM*. We show that the Commission's proposals would gravely threaten universal service, while the traditional approach of linking universal service contributions to the provision of transmission facilities continues to provide a sound basis upon which to consider any necessary adjustments to the federal universal service system.

I. BACKGROUND

The Commission's attempt to provide clear meaning to several of the Act's definitional provisions seems at first glance to be an unobjectionable enterprise. But by tentatively concluding that there is no identifiable "telecommunications service" when

the ILEC provides information services over its own facilities, and that any underlying "telecommunications" is "private carriage" and not "common carriage," the Commission is in fact proposing to jettison thirty years of common carriage regulation of bottleneck facilities, and a 500-year common-law doctrine that holds that such facilities need to be made available to all that need them to provide their own goods and services. Precisely because the Commission's ostensible purpose here is so at odds with the true reach of its proposal, it does not explain in any concrete way why it wishes to abandon a regulatory framework that is almost universally acknowledged to have produced extraordinary consumer benefits by permitting competitive information services markets to flourish. And the Commission seems unconcerned about the harms that were caused in the past when regimes similar to that it now proposes were put in place.

The statutory definitions the Commission is construing to work this stealth revolution in telecommunications policy – "telecommunications service" and "information service" – are hardly unambiguous. The most sensible way to address the questions raised in this *Notice*, then, is to start by addressing the policies the Commission wishes to abandon, to describe why they were developed and what purpose they were intended to serve, and to consider whether changed circumstances warrant the regulatory revolution proposed in the *Notice*. Only then does it make sense to turn to the definitions themselves and determine their proper construction in light of their plain meaning, the 1996 Act's other provisions, and its more general purposes.

We start, then, with an analysis of the doctrine of "common carriage" as it has been applied historically and in the developing history of telecommunications regulation by the Commission following the enactment of the 1934 Act, through the breakup of the

Bell System, and after the 1996 Act. We discuss the need for continuing regulation of bottleneck facilities, and the likely consequences of the Commission's proposed deregulation. Finally, we discuss the current competitive environment in the markets for the telecommunications facilities the Commission is addressing here, for advanced telecommunications services provided over those facilities, and then for Internet access services that make use of both basic and advanced telecommunications services.

A. The Regulatory Background

1. The Historical Concept of Common Carriage

For more than 500 years, the law of common carriage has been applied to address the problems that result from private monopolistic control over bottleneck facilities. The law of common carriage arose in fifteenth-century England, as a response to the monopoly power of private parties engaged in certain public callings, and was fully developed by the end of the seventeenth century.[8] While "the ordinary law was protection enough" in competitive markets, "an extraordinary law was needed in behalf of those that came to the smith" and others engaged in professions whose practitioners were "so scattered that the conditions were those of virtual monopoly."[9] The doctrine was quickly applied to carriers of goods: "The conditions surrounding transportation

[8] Matthew Hale, *A Treatise in Three Parts*, *in* 1 *Collection of Tracts Relative to the Law of England* 1, 78 (Francis Hargrave ed. 1787); *see also* Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 Harv. L. Rev. 759, 765 (1930).

[9] Bruce Wyman, *The Law of Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 158 (1904).

were those of virtual monopoly. The merchant had therefore the protection of the law, a protection without which he stood no chance against oppression by the carrier."[10]

As it developed in American jurisprudence, the law of common carriers combined this focus on bottleneck facilities and services with a focus on the conduct of the carrier. In the late nineteenth century, American courts upheld service and price regulations of railroads and other private businesses "on the basis of the near monopoly power exercised by the railroads, coupled with the fact that they 'exercise a sort of public office' in the duties which they perform."[11] In *Munn v. Illinois*, the Supreme Court adopted British common law and upheld a state's price regulation of grain elevators against constitutional challenge, concluding that regulation was justified because the elevator operators were clothed with a public character, since "[t]hey stand . . . in the very 'gateway of commerce,' and take toll from all who pass."[12]

Among the customers from whom common carriers had to "take toll" were other carriers. Thus, the Post Roads Act of 1866 required telegraph companies to interconnect with each other. As a New York court would later declare, "A telegraph company represents the public when applying to the other [telegraph company] for service, and no discrimination can be made by either against the other, but each must render to the other the same services it renders to the rest of the community under the same conditions."[13]

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[10] *Id.* at 160.

[11] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* (*NARUC I*), 525 F.2d 630, 640 (D.C. Cir. 1976) (citing *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 130 (1876)).

[12] 94 U.S. (4 Otto) at 131-32.

[13] *New York ex rel. Western Union Tel. Co. v. Public Serv. Comm'n of New York*, 129 N.E. 220, 222 (N.Y. 1920).

2. Common Carriage Runs Off Course

Common carriage, then, was a well-developed concept by the time the telephone was invented. Nevertheless, at the end of the nineteenth century, "legislators, regulators, and the courts drifted toward a narrow understanding of a common carrier's obligations to carry its competitors' traffic."[14] In the *Express Packages* cases, the Supreme Court decided that railroads did not have to sell space at wholesale rates to express courier companies.[15] Similarly, "common [carrier] law" did not require "telephone companies to accord to any such outside organization or its patrons connection with its switchboard on an equality with its own patrons."[16]

These decisions were a critical contributing factor in the development of the Bell monopoly over telephone service. In the early 1900s, independents owned as many phone stations as Bell.[17] But absent regulation, Bell came to understand "the importance of interconnection as a competitive weapon."[18] It refused to allow the independents to interconnect with its local exchanges or with its long distance service.[19] As a result, the independents began to fold, and the Bell monopoly over local and long distance service gradually coalesced. Bell similarly gained control over the market for customer premises equipment by including in its tariffs provisions precluding foreign attachment of any non-Bell system product to the Bell network.

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[14] Michael Kellogg, John Thorne & Peter Huber, *Federal Telecommunications Law* 13 (1992).

[15] *Express Packages Cases*, 117 U.S. 1 (1885).

[16] *Pacific Tel. & Tel. Co. v. Anderson*, 196 F. 699, 703 (E.D. Wash. 1912).

[17] Roger G. Noll & Bruce M. Owen, *The Anticompetitive Uses of Regulation: United States v. AT&T*, in *The Antitrust Revolution* (J. Koka & L. White eds., 1989).

[18] *Id.*

[19] *Id.*; *Federal Telecommunications Law* at 11.

Congress eventually recognized the problems created by the absence of regulation, and analogizing communications services to railroads, Congress explicitly applied the law of common carriage to telephone and telegraph services in the Mann-Elkins Act of 1910.[20] That law gave the Interstate Commerce Commission ("ICC") regulatory jurisdiction over communications. The ICC took few steps to regulate the industry, however, and did not require interconnection. As a consequence, Bell's dominance of the telephone industry grew despite this legislative action.[21]

Motivated in large measure by its growing concern regarding the monopoly power of communications providers,[22] in the Communications Act of 1934 Congress transferred regulatory control of communications services to the newly created Federal Communications Commission. In order to mitigate the problems that attended the telephone companies' monopoly over the telephone network, Congress imposed significant restrictions on the activities of "common carriers" – which the 1934 Act defined, circularly, as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."[23] Under Title II of the Act, common carriers were required to "furnish . . . communication service upon reasonable request therefore" to any member of the general public.[24] Common carriers for the first time were also required to interconnect with other carriers "in cases where the Commission, after

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[20] Pub. L. No. 61-218, § 7, 36 Stat. 539, 544.

[21] *Anticompetitive Uses of Regulation* at 354; *Federal Telecommunications Law* at 16.

[22] *See, e.g.*, 78 Cong. Rec. 8822 (1934) (statement of Sen. Dill) (discussing extent of telephone monopoly).

[23] 47 U.S.C. § 153(h) (1970). The D.C. Circuit has read that definition to reflect the common law of carriers *NARUC I*, 525 F.2d 630; *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* (*NARUC II*), 533 F.2d 601 (D.C. Cir. 1976).

[24] 47 U.S.C. § 201.

opportunity for hearing, finds such action necessary or desirable in the public interest." The Act also required common carriers to charge rates that were "just and reasonable" and nondiscriminatory.[25]

By this point, however, the new FCC was no match for the Bell System. Despite the FCC's authority to require interconnection, Bell continued to prevent other carriers from interconnecting long distance networks and customer premises equipment to the Bell local network. Bell also purchased almost all of the equipment used in its own network from Western Electric, the Bell System's manufacturing arm. The FCC did not step in to stop these practices.

The government in fact repeatedly missed opportunities to promote competition. As Kellogg, Thorne and Huber explain:

> The courts might have done the job in the beginning by simply building on ancient principles of common carriage. A one sentence decision in the *Express Package* cases might have made all the difference – a sentence to the effect that common carriers really were *common* carriers, even for business brought to them by other carriers. State legislatures and public utility commissions . . . too could have insisted that carriers really had to be carriers, for each other as well as for the general public. The federal government, first through the ICC and later the FCC, could have demanded the same, at least for interstate traffic. . . . Every opportunity was missed, however, and when government intervened it did so not to promote market forces but to outlaw them once and for all.[26]

3. The Rise of Competition

The reach of the Bell monopoly began to diminish only with revitalization of the concept of common carriage. When the Commission began to apply these principles to require Bell to allow other companies to access its network, competition began to take

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[25] 47 U.S.C. §§ 201(b), 202.

[26] *Federal Telecommunications Law* at 22-23.

root. This was so with respect to customer premises equipment ("CPE"), long distance service, and information services.

a. Customer Premises Equipment

For nearly a century, Bell refused to allow customers to connect non-Bell equipment to the Bell network. In 1968, however, the Commission set a new course and ruled that prohibiting connection of non-harmful devices at the customer premises is both unreasonable and discriminatory. It concluded that "[n]o one entity need provide all interconnection equipment . . . any more than a single source is needed to supply the parts for a space probe."[27]

Rejecting subsequent efforts by the Bell monopoly to preserve its monopoly over CPE,[28] the Commission ultimately established a registration program to allow any manufacturer to provide equipment that met particular standards.[29] Subsequently, the Commission concluded that provision of CPE should be detariffed and CPE should be provided on a competitive basis.[30] The Commission adopted a bedrock common carrier principle that it applied to CPE as well as to information services (*see infra* pp. 19-23): bottleneck transmission services would be subject to regulation, so that downstream services that depend on those bottleneck facilities could be deregulated. Under the

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[27] *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968).

[28] *See United States v. American Tel. & Tel.*, 524 F. Supp. 1336, 1349-50 (D.D.C. 1981).

[29] *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C.2d 593 (1975).

[30] *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, ¶ 9 (1980) ("*Computer II*").

Modification of Final Judgment ("MFJ"), the Bells also were forbidden from manufacturing equipment.[31]

The result was significant benefit for consumers. As the Commission has explained, "decisions to deregulate the provision of customer premises equipment resulted in greatly increased consumer choice among a wide range of such products, and a sharp decrease in prices."[32] "The combination of the FCC's deregulatory policies and divestiture has led to a highly competitive market structure for CPE." Providers have stormed into the market with innovative products. Output has expanded dramatically for cordless phones, corded phones, cellular phones, answering devices, and PBXs. And prices of most of these items have fallen dramatically."[33]

b. Long Distance Service

As in the CPE market, competition for long distance services was suppressed because the FCC failed to adopt and enforce vigorous common carrier regulation, and began to develop only when the courts prodded the FCC to mandate unrestricted resale and interconnection of Bell services.

For most of the twentieth century, Bell remained the long distance monopolist. While the Commission attempted to promote competition by requiring interconnection, Bell successfully flaunted these orders. The FCC took the first significant step towards promoting competition in the long distance arena in 1971 when it authorized MCI to

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[31] *United States v. American Tel. & Tel.*, 524 F. Supp. at 1349-50.

[32] *In re Policy and Rule Concerning Rates for Dominant Carriers*, 4 F.C.C.R. 2873, ¶ 26 (1989) ("*Dominant Carriers*").

[33] *Federal Telecommunications Law* at 533-34 (footnote omitted).

provide specialized communications services.[34] As it had with CPE, Bell attempted to stop this competition, and refused to interconnect with the new carriers. While the FCC ultimately ordered Bell to allow access to its FX and CCSA services,[35] the Bell System "persisted in denying interconnection that had the best technical properties."[36]

After gaining a foothold in the provision of private line services, MCI utilized FX to create its Execunet service, which directly competed with Bell's basic switched service. Although the FCC initially ruled this tariff unlawful, the D.C. Circuit reversed, remanding for a clearer explanation of why the tariff was against the public interest, since the FCC had not found that an AT&T monopoly over public switched services was in the public interest.[37] In the interim, Bell announced that it would not provide interconnection for Execunet, and the Commission agreed this was acceptable.[38] In *Execunet II*, the D.C. Circuit reversed this FCC decision as well.[39] Moreover, MCI prevailed in a private antitrust suit based on AT&T's refusal to interconnect MCI's service with Bell's local facilities.[40]

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[34] *In re Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service*, 29 F.C.C.2d 870, 871 (1971), *aff'd sub nom. Washington Util. & Transp. Comm. v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

[35] *In re Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 416 (1974), *aff'd sub nom. Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974).

[36] *Anticompetitive Uses of Regulation* at 295-326.

[37] *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977).

[38] *In re Petition of AT&T for a Declaratory Ruling and Expedited Relief*, 67 F.C.C.2d 1455 (1978).

[39] *MCI Telcomms. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir. 1978).

[40] *MCI Communications Corp. v. American Tel. & Tel.*, 708 F.2d 1081 (7th Cir. 1983).

After the *Execunet* decisions, the Commission finally changed course and concluded that there should be open competition in long distance service.[41] The Commission adopted specific rules to enforce equal access requirements.[42] It also required Bell to allow competitors to resell Bell's long distance services.[43]

As the Commission grudgingly began to permit competition, the MFJ court broke up the Bell monopoly. In denying a motion to dismiss and later approving the consent decree, the court relied in part on Bell's failure to provide nondiscriminatory interconnection. The government's evidence "show[ed] that defendants [had] sought in a variety of ways to exclude the competition by restricting interconnection to the local facilities."[44] The court also relied on Bell's ability to cross-subsidize to protect its long distance market. By allocating joint long distance and local costs to the local side, where they could be recovered through higher regulated prices, Bell could eliminate long distance competition by selling its long distance services below cost.[45]

The court concluded that "[t]he key to the Bell System's power to impede competition has been its control of local telephone service. The local telephone network

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[41] *In re MTS and WATS Market Structure, Phase I*, 81 F.C.C.2d 177 (1980), *modified on recon.*, 97 F.C.C.2d 682 (1983), *modified on further recon.*, 97 F.C.C.2d 834 (1984), *aff'd in principal part and remanded in part, NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

[42] *In re MTS and WATS Market Structure, Phase III*, 100 F.C.C.2d 860 (1985); *Investigation into the Quality of Equal Access Services*, 60 Rad. Reg. 2d (P&F) 417, 419 (1986).

[43] *In re Regulator Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167, 175-76 (1980); *AT&T, Restrictions on Resale and Sharing of Switched Services*, 53 Rad. Reg. 2d (P&F) 112 (1983), *aff'd sub nom. NARUC v. FCC*, 746 F.2d at 1492.

[44] *United States v. AT&T*, 524 F. Supp. at 1353.

[45] *United States v. AT&T*, 552 F. Supp. at 162.

functions as the gateway to individual telephone subscribers. It must be used by long-distance carriers seeking to connect one caller to another. . . . The enormous cost of the wires, cables, switches, and other transmission facilities which comprise that network has completely insulated it from competition. Thus, access to AT&T's local network is crucial."[46] The court therefore entered the MFJ severing the BOCs from AT&T, authorizing the BOCs to provide service only within LATAs, and requiring the BOCs to provide access to all interexchange carriers on equal terms.[47] It found "clear, and indeed overwhelming, procompetitive justifications" for these restrictions.[48]

Competition burgeoned as a result of the new environment stemming from the MFJ and from the FCC's altered regulatory approach. The Commission has explained that "after we opened entry into the market for interstate long distance services, and determined that the lack of market power among new entrants made it unnecessary to regulate their operations comprehensively, the prices for such services fell and the number of service providers grew exponentially."[49]

c. Information Services

The history of information services teaches the same lesson as the history of CPE and long distance services. A 1956 consent decree precluded the Bell System from offering data processing services, and the MFJ expanded this prohibition to include all information services. The MFJ also required the BOCs to provide "information access" (a form of exchange service) to information service providers equal to the access

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[46] *Id.* at 223.
[47] *Id.* at 142, 195-97, 209 n.327.
[48] *Id.* at 189.
[49] *Dominant Carriers* ¶ 26.

provided to AT&T.[50] The court justified restrictions on BOC provision of information services because "[h]ere, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly."[51]

As data processing services began to grow and became increasingly intermingled with communications services, the Commission had to determine the appropriate regulatory treatment of these two kinds of services. In *Computer I,* the Commission drew a distinction between "basic" transmission services, and "enhanced" services that were carried over those basic transmission services. In *Computer II,* it concluded that "basic transmission services are traditional common carrier communications services" and "enhanced services are not."[52] Accordingly, it determined that basic transmission services would be regulated under Title II, while enhanced service, although subject to the Commission's Title I ancillary jurisdiction,[53] would remain unregulated. The Commission also asserted its ancillary jurisdiction to preempt any inconsistent state regulation of enhanced services.

As defined in *Computer II*, basic service was the "the common carrier offering of transmission capacity for the movement of information," which involves providing a communications path "for the analog or digital transmission of voice, data, video, etc.

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[50] *United States v. AT&T,* 552 F. Supp. at 227; *id.* at 141 n.40.
[51] *Id.* at 189.
[52] *Computer II* ¶ 119.
[53] *Id.* ¶¶ 124-125.

information."[54] While transmission capacity traditionally had been offered for discrete services, such as telephone service, this was no longer the case. Instead, the order states, carriers increasingly "provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile, or other forms of transmission."[55] Thus, from the outset, the Commission embraced a broad-based definition of basic communications services, which transcended the particular features or applications used with the service.

Enhanced service, on the other hand, included "any offering over the telecommunications network which is more than a basic transmission service."[56] In particular, enhanced services were "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[57] Such services include data retrieval through a mail box, voice storage, and automatic call answering.[58]

While acknowledging that "enhanced services are dependent upon the common carrier offering of basic services,"[59] the Commission declined to regulate the resulting

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[54] *Id.* ¶ 93.

[55] *Id.* ¶ 94.

[56] *Id.* ¶ 97. The three-part definition of "enhanced services" was codified in the FCC's rules at 47 C.F.R. § 64.702(a).

[57] 47 C.F.R. § 64.702(a).

[58] *Computer II* ¶¶ 97-98.

[59] *Id.* ¶ 231.

enhanced services, "the remaining components of which are available from the competitive resources and capabilities of the data processing industry."[60] Instead, the Commission separately identified and regulated the underlying transmission facilities. In order to prevent facilities-based carriers from acting on their incentive to leverage their control of bottleneck basic facilities onto the downstream market for enhanced services, the Commission required such carriers to unbundle and provide the underlying transmission services on a nondiscriminatory basis. The thrust of this requirement, the Commission explained, is "to establish a structure under which common carrier transmission facilities are offered by them to all providers of enhanced services (including their own enhanced subsidiary) on an equal basis."

This means that "the same transmission facilities or capacity provided the subsidiary by the parent, must be made available to all enhanced service providers under the same terms and conditions." This requirement "provides a structural constraint on the potential for abuse of the parent's market power through controlling access to and use of the underlying transmission facilities in a discriminatory and anticompetitive manner."[61]

The BOCs opposed the *Computer Inquiry* rules for the same reason they urge their abandonment here: in their view, if they were allowed to extend their monopoly to information services, they would have an incentive to innovate and create new services. If they were forced to share their facilities, they threatened, they would not invest in the network. In the Commission's *Computer II* unbundling rules,[62] the Commission rejected

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[60] *Id*. ¶ 132.

[61] *Id*. ¶ 229.

[62] These rules were codified at 47 C.F.R. § 64.702(b), (c) (2001).

this argument. It prohibited AT&T and GTE from providing enhanced services unless they complied with specific requirements, including the establishment of separate corporations to provide enhanced services, which must, *inter alia*, (1) obtain all transmission facilities pursuant to tariff, (2) operate independently from the carrier, and (3) deal with affiliated manufacturing entities on an arm's length basis. In addition, carriers were required (1) not to sell or promote directly any enhanced services, (2) to disclose publicly all network design and technical standards information affecting changes to the underlying telecommunications network, and (3) not to provide customer proprietary information to the separate corporation.[63]

These fundamental nondiscriminatory unbundling requirement have remained in place. Subsequent orders clarified that dominant carriers operating under the *Computer II* structural separation rules were prohibited from offering basic and enhanced services together at a single bundled price. Moreover, the BOCs ultimately were allowed to jointly market enhanced services and telecommunications services, but "they remain obligated to offer the telecommunications service component separately" through the Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements.[64]

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[63] *See* 47 C.F.R. § 64.702(b), (c). As the Commission regulated the transmission component of information services, the MFJ court concomitantly was able to relax the MFJ's information services structural separation restrictions. *See United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990); *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990) (BOCs permitted to provide "gateway" information services); *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir. 1993) (BOCs permitted to provide information services generally).

[64] *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, ¶ 43 (2001) ("*CPE/Enhanced Services Bundling Order*") *See In re*

Thus, even while the Commission replaced the BOCs' structural separation requirements with nonstructural safeguards,[65] it affirmed and strengthened the requirement that the BOCs must acquire transmission capacity for their own enhanced services operations under the same tariffed terms and conditions as competitive ESPs.[66]

4. The 1996 Act and After

In the Telecommunications Act of 1996, Congress picked up where the Commission and the MFJ had left off. The basic principles of the MFJ and the *Computer Inquiry* rules were either directly incorporated or implicitly understood in the Act's definitions and prescriptions. Thus, Congress concluded that a "telecommunications provider" is subject to common carrier regulation, including the Act's interconnection obligations, "to the extent that it is engaged in providing telecommunications services."[67] The term "telecommunications service," in turn, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used."[68] The Commission has thus far interpreted the term "telecommunications carrier" as essentially synonymous with the term "common carrier" as it was used in the 1934 Act.[69]

Amendment of Section 64.702 of the Commission's Rules and Regulations, 104 F.C.C.2d 958, ¶¶ 98-99 (1986) ("*Computer III*") (establishing Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) requirements).

[65] The Ninth Circuit twice has remanded this decision to the FCC for a lack of legal and record support. The Commission has not yet addressed the Court's concerns, despite the passage of some seven years.

[66] *CPE/Enhanced Services Bundling Order* ¶ 4.

[67] 47 U.S.C. § 153(44).

[68] *Id.* § 153(46).

[69] *In re AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21585, ¶ 6 (1998) ("[T]he term 'telecommunications carrier' means essentially the same as common carrier."), *aff'd*,

Under the 1996 Act, common carrier regulations apply wherever a communications operator exercises control over a bottleneck facility. Thus section 251 of the Act imposes duties on carriers that vary depending upon those carriers' control of bottleneck facilities. At the most general level, all carriers are required to interconnect with other carriers and to configure their networks so as not to frustrate interconnection with other carriers.[70] Further, all LECs are required to provide resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation.[71] Finally, all but the smallest ILECs have more stringent duties, including the duty to provide unbundled access to network elements.[72] And for the BOCs, the MFJ's structural separation requirements were carried forward in section 271 of the Act. This progressive tightening of the reins implicitly acknowledges the principle described above – that specific regulations are needed to protect the public interest from the exercise of market power by carriers that control bottleneck facilities.

B. The Continuing Need To Regulate Bottleneck Facilities.

The most important lesson to draw from the uneven history of competition in American telecommunications markets is that shared access to bottleneck transmission

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Virgin Islands Tel. Corp. v. FCC, 198 F.3d 921, 927 (D.C. Cir. 1999); *accord In re Cable & Wireless, PLC Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable*, 12 F.C.C.R. 8516, ¶¶ 12-13 (1997). No court to date has independently interpreted the statute, however. While the D.C. Circuit has held that the Commission's interpretation is a permissible construction, it has noted that the terms "telecommunications carrier" and "common carrier" are "not necessarily identical," and has reserved the question of what differences exist between the two terms. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999), *aff'g In re AT&T Submarine Sys. Inc.*, 13 F.C.C.R. 21585 (1998).

[70] 47 U.S.C. § 251(a).

[71] 47 U.S.C. § 251(b).

[72] 47 U.S.C. § 251(c).

facilities promotes competition, which in turn spurs innovation and investment, and so benefits consumers. Whenever the courts or the regulators relaxed their enforcement of these common carrier obligations, monopolization spread into downstream markets, prices rose, and innovation stalled.

When they believe their own bottleneck facilities are put at risk by another bottleneck, the ILECs themselves have drawn the same conclusions:

> [W]ithout the kind of strong relief required to break [the] monopoly, [a bottleneck monopolist] . . . will favor its own and its partners' services, exclude competitors' products and services from access to consumers, and degrade its rivals' services and raise their costs. Because potential customers will have to pass through [the monopolist's bottleneck], the [monopolist] will retain the ability to exclude or marginalize all manner of . . . messaging products, video or music offerings, Internet services, and other 'utilities' of modern life. . . . By controlling all these communications gateways, [the monopolist] will not only preserve its [bottleneck] against all serious threats, it will substantially lessen competition in the provision of innovative new "convergent" services.[73]

They well understand that while competitive markets maximize social welfare, firms that control bottleneck facilities, if left unregulated, restrict output, increase prices, and do not develop innovative services.[74]

The Commission's pro-competitive deregulatory *Computer Inquiry* policies embraced this rule and have greatly benefited consumers. In the early 1970s companies such as CompuServe and Prodigy began providing interactive information content services. Contrary to the suggestion in the *Notice*, these pre-Internet information services

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[73] *United States v. Microsoft Corp.*, Civ. Act. No. 98-1232, Comments of SBC Communications Inc. on the Proposed Final Judgment at 3-4 (Jan. 28, 2002).

[74] Declaration of Daniel Kelley ("Kelley Decl.") ¶¶ 58-72, Attachment 1 hereto. Mr. Kelley's declaration addresses economic issues raised in this proceeding, including issues relating to the conditions necessary to preserve competition among ISPs and the dangers of failing to regulate bottleneck monopolists.

were not limited to the provisioning of voice mail.[75] These enhanced service providers ("ESPs") offered interactive services via computer connections using FTP, Telenet, Usenet, and other protocols, and utilized a vast array of applications in the process.

Beginning in the mid-1990s, independent ISPs such as AOL, Earthlink, CompuServe, Prodigy, MSN, and thousands of smaller firms facilitated the mass deployment of Internet services by giving consumers access to Internet-based content over narrowband "dial-up" telephone connections. Today ISPs offer consumers a wide range of competitive services, including services such as customized web pages, web hosting, e-mail server provision, e-mail roaming, IP addresses (static or dynamic), access to domain name search and registration, browser and search engines, anti-spam software tools, Instant Messaging, streaming audio and video feeds, public radio station broadcasts, community bulletin boards and other local content, and technical seminars and workshops. Although the industry is experiencing consolidation and considerable churn due to the recent economic downturn, there still are thousands of ISPs providing consumers with a wide variety of choices.[76]

In contrast, because the *Computer Inquiry* rules have not been vigorously enforced in the broadband Internet access services market, ILECs have been able to favor their own ISPs, and consumers often lack the kind of choice of ISP available in the dial-up market.[77] As a result, consumers that want DSL-based Internet access services often

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[75] *See NPRM* ¶ 36.

[76] Kelley Decl. ¶ 17.

[77] In the *Computer III* remand proceeding, Earthlink and other ISPs detailed BOC practices that favor their own ISP affiliates Comments of Earthlink, Inc., CC Docket No. 95-20 (filed April 16, 2001). Additionally, a group of ISPs has filed a complaint with the

must settle for the ILEC ISP. According to recent estimates, the ILECs' ISP operations dominate the provision of retail high-speed Internet access provided via DSL connections. SBC recently boasted that 80 percent of its total DSL lines are signed up to its own ISP.[78] Other sources put the ILEC ISPs' share at between 78 and 87 percent.[79]

The absence of competition among broadband ISPs hurts consumers. ILEC ISPs typically do not provide business customers one services they demanded such as static IP addressing and routed CPE.[80] Most ILEC broadband ISPs similarly do not provide symmetric bandwidth capabilities for business locations whose usage patterns do not fit those of the typical residential customer.[81] Coupled with the fact that broadband ISP growth is roughly three times that of narrowband ISP growth,[82] ILEC discrimination in favor of its own ISPs raises serious concerns about the future of the independent ISP industry. Further deregulating ILEC bottleneck facilities only would exacerbate this problem.

Moreover, in violation of the *Computer* Inquiry rules, some ILECs have stopped offering loop-based telecommunications services that CLECs and ISPs could use to

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California Public Utilities Commission alleging that SBC discriminates unreasonably in favor of its own ISP operations in the provision of DSL services *California ISP Ass'n v. Pacific Bell Tel. Co.*, Case No. 01-07-027, before the California Public Utilities Commission (filed July 25, 2001).

[78] Eric Krapf, *The Coming DSL Debacle*, Bus. Comm. Rev., June 2001, at 6.

[79] Sue Ashdown, *Can America Compete with Bell Lobbying Armies?*, Internet Industry Magazine, Fall 2001, at 74-75.

[80] Declaration of Ian T. Graham ("Graham Decl.") ¶ 44, Attachment 2 hereto. Mr. Graham's delcaration explains certain aspects of DSL technology and related aspects of computer networking technology, and competitors'need for unbundled access to ILEC facilities.

[81] *Id.*

[82] Patricia Fusco, *Top U.S. ISPs by Subscriber*, ISP Planet, November 2, 2001.

provide DSL-based services that are distinct from the ADSL-based services offered by the ILEC ISPs.[83] The ILECs have no incentive to offer these services because they compete with profitable ILEC services such as fractional T1 and ISDN.[84]

Competitive DSL providers thus continue to play a critical role in the markets for broadband and high-speed Internet access services, because they offer wholesale and retail services not offered by the ILECs. For example, WorldCom and Covad each provide business-class DSL services that are uniquely tailored to the individual needs of their customers that are not available from the ILECs. WorldCom's Solo Internet DSL service offering is targeted to sole proprietorships and enterprise customers who wish to purchase high-speed connections for employees to use as a remote work location.[85] Similarly, Covad's TeleSoho Service is designed for small offices and home offices with one to four users.[86] In addition, both WorldCom and Covad offer Symmetrical Digital Subscriber Line (SDSL) services to businesses that need access to business critical applications. A typical business customer may be a large retail chain such as a grocery store that must routinely share inventory and pricing information with its locations dispersed throughout the state or country. WorldCom and Covad's DSL offerings enable these large enterprise customers to link their various locations together in a cost-effective

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[83] *Id.*

[84] *Id.*; Kelley Decl. ¶ 66.

[85] http://www.worldcom.com/us/products/access/dsl/.

[86] http://www/covad.com/businessservices/.

manner.[87] The ILECs do not offer these services, preferring that customers purchase expensive dedicated circuits from the BOCs.[88]

Both WorldCom and Covad also provide DSL telecommunications services to ISPs, which in turn are able to offer consumers with high-speed access to the Internet at affordable prices.[89] The BOCs have not developed a competitive wholesale ISP product because they would rather steer all DSL customers to their own affiliated ISP.[90] The ability of independent ISPs to obtain broadband services from competitive providers such as WorldCom and Covad is critical to competition for retail high-speed Internet access. Without competitive DSL services provided by competitive providers, most ISPs (especially small and regional players) cannot compete with the ILEC retail offerings, which will restrict consumer choice and limit the opportunity for creative development of broadband applications that will drive consumer adoption.[91]

As this experience suggests, rules securing the ILEC monopoly are not likely to lead to more innovative broadband services. As we have demonstrated, the ILECs' claims that if only they were deregulated they would invest and innovate have repeatedly proved false. Innovation is as likely to threaten existing ILEC revenue streams as it is to open new ones, and monopolists therefore are more likely to suppress innovation than welcome it. The very service method the FCC is considering here – ADSL to provide Internet access service – has long been available, but, as the FCC itself has recognized, it

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[87] *See supra* nn.87, 88.
[88] Graham Decl. ¶ 47; Kelley Decl. ¶63.
[89] Graham Decl. ¶ 47; Kelley Decl. ¶63.
[90] Kelley Decl. ¶ 63.
[91] Graham Decl. ¶¶ 45-46.

was never deployed by the ILECs until competition from data CLECs and cable modem service providers forced the ILECs to deploy it. [92]

Multiple firms trying different strategies are far more likely than a monopoly to produce innovative products.[93] A fundamental underpinning of the 1996 Act is that competition among service providers is the surest means of ensuring the availability to consumers of an array of telecommunications services at reasonable prices. The ILECs' assertion that access to its bottleneck facilities will discourage innovation and deployment has a long pedigree, but it is as unfounded now as it was a twenty years ago.

While the ILECs claim that regulation has suppressed their incentive to supply broadband facilities, a far more likely explanation for the current pace of deployment of broadband facilities is that the demand for such services is being fully met by existing facilities.[94] And the surest way to increase demand is to allow a competitive market to develop in which innovative services will spark that demand.[95] Rules that will eliminate competition are far more likely to deter broadband deployment than to ---encourage it.

An equally troubling prospect is that if ILECs are allowed to extend their monopoly downstream through integrated ISPs, they will have every incentive to engage in content-based discrimination of Internet content. Internet consumers use portal sites to reach web-based services and information sources. The ISP can channel consumers to

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[92] *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 F.C.C.R. 2844 (2002) ¶ 68 ("*Third 706 Report*").

[93] Kelley Decl. ¶ 66.

[94] *See infra* pp. 40-41.

[95] Graham Decl. ¶ 46.

particular services or sites in a number of ways. For example, they can speed access to favored sites or even block access to particular locations in order to steer consumers to affiliated vendors or content providers. As Jerry Hausman, Gregory Sidak and Hal Singer explain,

> an integrated provider could engage in content discrimination – insulating its own affiliated content from competition by blocking or degrading the quality of outside content. Content discrimination could involve a range of strategies, from blocking outside content entirely, to affording affiliated content preferential caching treatment.[96]

As more communications services move to Internet-based platforms, the harm caused by such content-based discrimination becomes greater. A customer of Verizon's bottleneck Internet telephony service would be greatly harmed if connections to one retail establishment were degraded because Verizon.net had a "preferred" arrangement with a different retailer. When that customer is told she has no choice but to accept Verizon's degraded service because it is an "information service," and not a "telecommunications service," she is not likely to be satisfied with the answer. As this example suggests, the inevitable consequence of the deregulation of the bottleneck transmission provider is the re-regulation of the integrated ISP.

Common carrier regulation, and most specifically the common carrier regulation implemented in the *Computer Inquiry* proceedings, effectively stops such discrimination and allows competitive downstream markets to develop without the need for regulation. When there are many ISPs to choose from, enough consumers would object to such discrimination, and the market would obviate the need for regulation. But were there

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[96] Jerry A. Hausman, J. Gregory Sidak & Hal J. Singer, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, Yale J. on Reg., Winter 2001, at 129, 158.

only one or two ISPs, each affiliated with the wireline and cable modem bottleneck providers, there would be no reason for them not to act on their incentives and engage in content discrimination through the Internet access services they provide.

In sum, a rule that allows ILECs to extend their monopoly onto downstream information services markets would greatly disserve the public, and would in the end require re-regulation of information services markets that were previously competitive and so were properly left unregulated. For competition to survive in markets downstream to bottleneck transmission facilities, those facilities must be open to all on equal terms.

This *NPRM* suggests that this principle still has yet to take firm root, and that the Commission believes that by manipulating labels it can avoid the need to regulate the bottleneck. As the BOC lawyers themselves explain, it is long past time for such logic-chopping to cease:

> What has yet to emerge from either the FCC or antitrust jurisprudence is a single solid principle: carriers sell carriage, and their obligation to do so does not depend on whether the customer is itself a competing carrier. The principle here is over a century old, dating back to (though not affirmed in) the *Express Package* cases. Sooner or later courts and regulators will get it right. Carriers are customers, customers are carriers, terminals are seminals, equipment is service, service is equipment, the vocabulary is all irrelevant – all that can count is the nature of what is bought or sold. Sooner or later we will reach the point where service is simply service, where common carriage is truly common, where equal access is truly equal.[97]

C. The Current Competitive Environment

The only sound policy justification for abandoning regulation of bottleneck facilities would be an empirical conclusion that last-mile transmission facilities are no longer bottleneck facilities. The critical empirical question that needs to be resolved in

[97] *Federal Telecommunications Law* at 62.

this proceeding, then, is whether the ILECs continue to exercise market power when they control last-mile transmission facilities.

As we show in what follows, the ILECs do indeed continue to have bottleneck control over such facilities. Specifically, the ILECs continue to exercise monopoly control over virtually all last-mile transmission facilities used to provide broadband data services to business customers and, along with the cable companies, are part of a duopoly that controls virtually all last-mile facilities used to provide these services to residential customers as well. As a result, the Commission should re-affirm its recent conclusion that "enhanced service providers remain dependent on ILECs for local access to their customers. . . . [The FCC] recognize[s] that ILECs may be able to leverage control over their local exchange facilities into market power over new or existing services."[98] Nor does the empirical evidence support the ILECs' claim that regulation has slowed the pace of deployment of broadband capable facilities, or that deregulation will spur such deployment.

1. ILECs Continue To Control Bottleneck Broadband Facilities

The ILECs control local and interoffice broadband-capable facilities that serve virtually every location in the country. These facilities can provide broadband as well as narrowband services. For example, ILEC fiber optic facilities with appropriate electronics are capable of providing pipes of whatever size is required. ILEC copper facilities are typically used to provide both analog and digital DSL-based services.[99]

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[98] *See CPE/Enhanced Service Unbundling Order* ¶ 58 n.237.

[99] HAI Report, Attachment 1 to Kelley Decl., at 74-75.

There is no other network or technology capable of providing broadband services that can match the ubiquity of ILEC facilities.[100] Mobile wireless companies do not currently provide broadband access and will not do so for the next few years. Firms providing fiber-to-the-home have an insignificant market presence today. Gigabit fixed wireless technology using "pencil-beam" waves in the upper millimeter-wave bands over very short distances show promise, but commercial deployment awaits Commission action on the spectrum licensing side, and the economics have not yet been demonstrated. Other fixed wireless technologies have had limited success. Electric power grids are not capable today of providing broadband services. Nor is it clear if they ever will be. Thus, the only current alternatives to the ILEC networks for broadband access are satellite, fixed wireless, CLEC fiber networks, and cable. But none of these networks has the scope and capabilities of the ILEC networks.[101]

Satellite service is available only to consumers with a generally southern exposure and no obstacles (hills, trees, buildings, etc.) in the line of sight to the satellite. Moreover, the service is significantly more expensive than DSL or cable modem service and provides slower download speeds than those technologies.[102]

A survey recently conducted by PC World Magazine reached the following conclusion regarding satellite broadband service: "Characterized by difficult, expensive installations, notoriously poor service, and suspect performance, the service meant for

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[100] See HAI Report.

[101] Kelley Decl. ¶ 28.

[102] *Id.* ¶¶ 37-39.

anyone who can't get cable or DSL has ceased to be a serious option."[103] At best, satellite is a legitimate alternative only for customers in areas where DSL or cable are not available.

Fixed wireless also lacks the capacity to constrain any attempt by the ILECs to exercise market power in the provision of broadband services to business customers. Fixed wireless service providers have sufficient capacity to serve only 5 to 10 percent of wireline broadband subscribers in larger markets.[104] Moreover, in order to provide service, line of sight is required.[105] Terrain, foliage, or buildings may all block line of sight. In any given market, 10 to 40 percent of customers do not have line of sight to the system hub location. External antennas must be affixed to the building being served, which requires providers to gain access to the rooftops of their customers' buildings. Such access can be expensive and difficult to negotiate, and has hindered carriers' ability to provide fixed wireless (or satellite) service to many businesses.[106] Further, in order to achieve line of sight, many customer locations require that the antenna be mounted on a mast twenty feet or higher. These masts are often restricted by local zoning regulations. Until such problems are addressed, fixed wireless data services will not constitute a viable, broad-based alternative to either business-grade or consumer DSL.

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[103] *Id.* ¶ 39.

[104] Kelley Decl. ¶ 40; HAI Report at 78. Even where available, moreover, MMDS at present supports only Internet Protocol-based services; it does not support voice, frame relay or Asynchronous Transfer Mode ("ATM") services. HAI Report at 78.

[105] Kelley Decl. ¶ 40.

[106] *Id.*

CLEC fiber networks reach only a small fraction of the business locations where there is likely to be demand for broadband services, and virtually no residential locations. CLEC fiber networks connect to no more than 30,000 buildings nationwide.[107]

Cable modem systems are not a sufficient alternative for several reasons. First, cable modem systems do not serve businesses.[108] Cable companies target buildouts to residential areas. Their service is rarely available to business customers. Moreover, cable modem service suffers from service quality and reliability problems that make it unsuited for business customers. These problems arise from cable's shared bandwidth architecture. In a business environment, where many users tend to be on the network at the same peak time, cable modems lose signal strength. Shared networks also pose security risks for businesses.[109] Without appropriately configured firewalls, cable modem users could see other users and their locations, and access any shared files simply by clicking on the "Network Neighborhood" icon on their computers. Cable's variable speed, lack of vendor guarantees, and other reliability concerns have made cable modem service an unpopular choice for businesses.[110]

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[107] *See The State of Local Competition 2001*, prepared by the Association for Local Telecommunications Services and available at www.alts.org. According to the ALTS study, only 5 percent of commercial tenants and less than 1 percent of residential tenants in multi-tenant environments have access to competitive telecommunications services. Promotion of nondiscriminatory building access policy would go a long way to bring the benefits of broadband to the 6.5 million small businesses and the 100 million Americans in multi-tenant environments.

[108] Kelley Decl. ¶ 42; *see also* Comments of Covad Communications, CC Docket No. 01-338, Joint Declaration of Anjali Joshi, Eric Moyer, Mark Richman, and Michael Zulevic, ¶ 15 ("Covad Triennial Declaration") (noting that cable modem service is generally not available to businesses).

[109] Covad Triennial Declaration ¶ 14.

[110] Kelley Decl. ¶ 42; HAI Report at 36-37.

Only in the residential broadband market does cable modem service provide an alternative to ILEC facilities. But in this duopoly market, the ILEC and cable modem provider exercise significant market power. There is no third choice.[111] The inadequacy of a facilities duopoly for ensuring consumer choice is not seriously disputed,[112] even by the ILECs, who have been among the harshest critics of oligopoly performance.[113]

The infirmities of a facilities duopoly was recently demonstrated by the effects of PCS entry into wireless markets in 1995. The two ILEC cellular providers had always maintained that their markets were competitive prior to PCS entry. Yet prices have declined over 50 percent since PCS entry. As the Yankee Group reported, "the rollout of PCS service encouraged the cellular carriers to speed conversion to digital, reduce prices, and offer more services."[114] Consumers greatly benefited when the market grew from two to six or seven carriers.

The ILECs' monopoly control over bottleneck transmission facilities is confirmed by the striking discrepancy between the ILECs' narrowband and broadband ISP market share. Because the *Computer Inquiry* rules have been effective as applied to ISPs using dial-up services, and because ILEC discrimination against dial-up ISPs is technically difficult to accomplish, there is a flourishing competitive dial-up ISP market, and ILEC ISPs have only a minimal share of that market. If broadband-capable facilities were equally available to ISPs, one would expect to find a similar competitive market with the

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[111] Kelley Decl. ¶ 44.

[112] Kelley Decl. ¶¶ 48-57.

[113] The ILECs have mistakenly characterized the long distance market as an oligopoly. Kelley Decl. ¶ 51 (citing Hausman testimony). But the theoretical point is correct: true oligopoly markets are subject to the exercise of market power.

[114] HAI Report at 84.

ILECs having a similar small market share. Instead, as we have shown, the ILEC ISPs, along with cable modem providers, dominate the ISP broadband market.[115]

Another indication of market power, and lack of competition, is the pricing of retail DSL-based services and competing cable modem services. Retail prices for high-speed Internet access (bundled with the broadband facilities) have risen markedly over the past year. In 2001, for example, ARS Inc. estimates that the average monthly rates for cable Internet access service increased from $39.40 to $44.22, while the average monthly rates for DSL-based Internet access service increased from $47.18 to $51.67.[116] Cable modem service operators too have recently announced price increases. These price increases together indicate that an ILEC/cable provider duopoly quickly is developing for residential Internet access services provided over broadband facilities. This lack of competition in the retail market for high-speed Internet access services reflects a lack of competition in the underlying wholesale market for broadband services.

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[115] *See supra* pp. 26-27; Patricia Fusco, Top U.S. ISPs by Subscriber: Analysis of 2001 Year End Reports, ISP-Planet, Feb. 11, 2002; Patricia Fusco, *Top U.S. ISPs by Subscriber*, ISP Planet, Feb. 11, 2002.

[116] Shelley Emling, *Tech Sector Lobbyists Pushing Broadband*, *Atlanta-Journal Constitution*, Feb. 10, 2002, at 1 (citing Mark Kersey, analyst for ARS Inc). For example, under the ADSL tariff of SBC Advanced Solutions Inc. (SBC-ASI), SBC's affiliated advanced data services provider, the lowest rate available is $35 per line, which is offered only to customers making a commitment of 750,000 lines for four years. SBCASI Tariff FCC No. 1, § 6.6. By contrast, in 1999, SWBT offered rates as low as $30 per line with lower volume requirements than in the current SBCASI tariff. SWBT Tariff FCC No. 73, Transmittal No. 2773, 2d revised, at 14210 (filed Aug. 12, 1999).

2. Unbundling Rules Are Not Deterring DSL Deployment

In each of the past three years, the Commission has concluded that advanced telecommunications capability is being deployed in a reasonable and timely manner.[117] The FCC attributes DSL growth to competition as a result of the 1996 Act,[118] and the Commission's own data shows that industry investment in infrastructure to support advanced services has increased dramatically since 1996.[119] From December 1999 to June 2001, ADSL lines increased over 700 percent from about 370,000 to 2.7 million lines,[120] with the ILECs controlling an overwhelming majority (93 percent) of ADSL lines in service compared to competitors who serve 7 percent of ADSL lines.[121] There is no empirical support for contrary claims that broadband is being slowed by unbundling rules imposed on the Bell Companies.

The four Bell Operating Companies are aggressively rolling out DSL service. The FCC reports that in 2001, approximately 64 percent of all ILEC customers were able to receive DSL service, up from 44 percent in 1999.[122] Financial information reported to Wall Street by the four BOCs corroborate the Commission's latest statistics. All four BOCs reported substantial growth in DSL lines in 2001 and all reported growth in data

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[117] *Third 706 Report* ¶ 2 (citing First and Second 706 Reports released in 1999 and 2000). The Commission's latest statistics show that in June 2001, high-speed subscribers were reported in all of the nation's states and 78 percent of the nation's ZIP codes, which contain 97 % of the country's total population. *Third 706 Report* ¶¶ 27-28.

[118] *Third 706 Report* ¶ 68 ("DSL deployment began in response to the 1996 Act and the presence of competitive access providers.").

[119] *Third 706 Report* ¶ 62.

[120] Industry Analysis Division, Common Carrier Bureau, FCC, *High-Speed Services for Internet Access* at Table 1.

[121] *Third 706 Report* ¶ 51.

[122] *Third 706 Report* ¶ 70.

services revenues. In 2001, BellSouth posted an annual growth rate of 189 percent for its DSL service and, in early 2002, announced that broadband is available to almost 70 percent of BellSouth households.[123] BellSouth finished 2001 with 620,500 DSL customers and reported annual data revenue growth of 24.9 percent, exceeding $1 billion each quarter.[124] Qwest reports a 74 percent increase in DSL subscribers in 2001.[125] With DSL revenue growth of 66 percent for the year, Qwest closed out 2001 with 448,000 customers.[126] Qwest explains that "it continues to leverage its infrastructure by offering broadband services for fast Internet connections,"[127] and that "stiff competition in the race to win high-speed Internet subscribers has spurred Qwest to develop new service and price packages."[128]

Last year, Verizon reported a 122 percent increase in DSL customers from 660,000 in 2000 to 1.2 million in 2001.[129] Verizon boasts that it has deployed DSL to central offices serving 79 percent of all access lines in its service territory.[130] Verizon reported data transport revenue growth of 21 percent, with revenues exceeding $7 billion.[131] Similarly, SBC reports that it is "the nation's leading DSL Internet Access Service provider" offering DSL service to more than 60 percent of its customers out of

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123 BellSouth Press Release, *BellSouth Reports Fourth Quarter Earnings*, Jan. 22, 2002.

124 *Id.*

125 Qwest Press Release, *Qwest Communications Reports Fourth Quarter, Year-End 2001 Results*, Jan. 29, 2002.

126 *Id.*

127 *Id.*

128 McDonald Investments, Investor Report, Sept. 18, 2001, at 5.

129 Verizon Press Release, *Verizon Communications Reports Solid Results for Fourth Quarter, Provides Outlook for 2002*, Jan. 31, 2002.

130 *Id.*

131 *Id.*

nearly 1400 central offices.[132] SBC has increased its DSL subscriber base from 3,000 customers in 1998 to more than 1.3 million at the end of 2001.[133] SBC's data revenues grew by more than $1.3 billion in 2001 with total data revenues of $8.8 billion.[134]

As this data suggests, the Commission's repeated assertion that there is a problem with broadband deployment that requires a radical shift in regulatory approach is difficult to square with any available evidence; but to the extent there is a problem, it appears to be more with consumer demand for these services than with the industry's supply. And, leaving to one side the wisdom of regulation designed to increase consumer demand for a product the regulator believes the consumer should want, creating a monopoly market for that product is hardly likely to increase that demand.

On the competitive side, despite bankruptcies and the economic downturn, the networks of the three competitive data providers – Covad, Rhythms and Northpoint – have survived in one form or another. Covad emerged from bankruptcy in December 2001 and continues to deliver a business-grade DSL product to ISPs and businesses.[135] WorldCom acquired select DSL assets from Rhythms and is using those assets to provide competitive DSL service offerings in 31 markets to businesses and ISPs. WorldCom's DSL business model differs from that of Rhythms, however, in that WorldCom is using

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[132] SBC DSL Internet Updated, February 2002, available at www.sbc.com.

[133] *Id.*

[134] SBC Press Release, *SBC Reports Fourth-Quarter Earnings*, Jan. 24, 2002.

[135] Covad's national DSL network covers more than 40 million homes and businesses in 94 metropolitan statistical areas. Covad Communications Group, Inc. Form 10-Q for the Quarterly Period Ended September 30, 2001, at 21. At the end of 2001, Covad had 351,000 DSL lines in service, of which 52 percent were business and 48 percent were residential lines. Covad Press Release, *Covad Announces Fourth Quarter and Year End Operating Statistics for 2001*, Jan. 16, 2002.

DSL as an access platform to connect business users with WorldCom's data network to deliver a wide range of services, including Internet access, VPNs, frame relay, and ATM. Finally, AT&T purchased some of Northpoint's assets last year and is putting those assets to use by bundling DSL service with AT&T's voice service.[136] Of course, all of these wireline competitors' networks are entirely dependent upon access to ILEC last-mile facilities.

II. THE FCC SHOULD ENFORCE AND STRENGTHEN ITS *COMPUTER* REQUIREMENTS

The Commission considers deregulation of bottleneck transmission facilities used to provide Internet access services in two related contexts. First, it considers eliminating the ILECs' obligation under the *Computer Inquiry* rules to make these facilities available to ISPs on a retail basis. Next, it considers eliminating the ILECs' obligations to make these facilities available on a wholesale basis to other telecommunications carriers, obligations that Congress established in the 1996 Act. Because the 1996 Act obligations grew out of the *Computer* framework, we start in Part II by considering the *Computer* cases.

A. Nondiscriminatory Unbundling Requirements Should Continue To Apply to ILEC-Provisioned DSL Services

The *Notice* attempts to distance the Commission from the legacy of its *Computer Inquiry* rules, and suggests instead that the enhanced services rules had been initiated at a time of "very different legal, technological, and market circumstances."[137] The Commission thus posits three reasons the *Computer Inquiry* rules should not apply in the

[136] WorldCom Triennial Comments at 95.

[137] *NRPM* ¶ 35.

broadband context: (1) Congress' adoption of the Telecommunications Act of 1996, with its mandate to promote competition, deregulation, and innovation; (2) the differences between narrowband and broadband technologies and applications; and (3) the existence of burgeoning intermodal competition, particularly between telephone companies and cable companies.[138] None of these factors holds any water. In fact, (1) the *Computer Inquiry* regime is entirely consistent with the goals and strictures of the 1996 Act, (2) there are no relevant differences between narrowband and broadband technologies and applications since all rely on the same local bottleneck facilities, and (3) the ILECs continue to exercise market power over last-mile transmission facilities.

1. The *Computer Inquiry* Regime Is Fully Compatible with the 1996 Act

The pertinent provisions of the Telecommunications Act of 1996 were designed in large measure to create and govern carrier-to-carrier relationships, rather than carrier-to-end-user or ISP relationships. As a result, much of the Act does not address Internet service providers. But the 1996 Act did not render the *Computer Inquiry* obsolete. To the contrary, as the Commission itself has acknowledged repeatedly, the common carrier rules established in the *Computer Inquiry*, as well as the regulatory definitions that are the embodiment of those rules, were the foundation upon which the 1996 Act was built.

At the level of general policy goals, the two regimes are in complete harmony. Thus, in the *Computer Inquiry*, the Commission repeatedly emphasized its intention to adopt rules that would maximize the ability to engender innovation and competition in an

[138] *NPRM* ¶¶ 35-37.

unregulated information services market.[139] Congress, too, highlighted this aim in section 230, where it noted with approval that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," and made it national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[140] The interactive services market environment that the Act embraces is the very same one the Commission helped to create and preserve over twenty years ago with the *Computer Inquiry* rules.

Both the *Computer Inquiry* rules and the 1996 Act are built on the same premise: *deregulation* of telecommunications markets, and of markets that depend upon telecommunications inputs, is possible only with *regulation* of bottleneck telecommunications facilities. In that sense, as the FCC has continually stressed, both the Act and the *Computer Inquiry* rules are deregulatory.

Congress also adopted the basic structure of the *Computer Inquiry* in the 1996 Act. Thus, as the FCC itself has concluded, Congress intended the definitions of "telecommunications service" and "information service" to mirror the preexisting definitions of "basic services" and "enhanced services" fashioned in the *Computer Inquiry* regime. "Congress intended the definitions of 'telecommunications,' 'telecommunications service' and 'information service' to build upon the frameworks established prior to the passage of the 1996 Act, including the MFJ and Commission

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139 *See, e.g., Computer II* ¶¶ 84, 102.

140 47 U.S.C. § 230 (a)(4), (b)(2).

precedent."[141] As the Commission stated in previously considering the 1996 Act's definitional provisions, "[o]ur analysis here rests on the reasoning [of] this [*Computer II]* framework."[142]

The Commission repeatedly has rejected BOC claims that the 1996 Act rendered the *Computer* rules unnecessary or obsolete. Following passage of the 1996 Act, several BOCs argued that the *Computer II*, *Computer III*, and ONA requirements were unnecessary and redundant in the face of the new local competition provisions. The Commission disagreed, concluding that the preexisting requirements are consistent with the 1996 Act, and continue to govern BOC provision of information services.[143] The Commission explained that the *Computer Inquiry*-based rules are "the only regulatory means by which certain independent ISPs are guaranteed nondiscriminatory access to BOC local exchange services used in the provision of intraLATA information services."[144] Continued enforcement of these safeguards is necessary, the Commission concluded, and "establishes important protections for small ISPs that are not provided elsewhere in the Act."[145]

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[141] *In re Implementation of the Non-accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 F.C.C.R. 21905, 13 F.C.C.R. 11230, ¶ 29 (1996), *remanded on other grounds*, 16 F.C.C.R. 9751 (2001) ("*Non-Accounting Safeguards Remand Order*"). *See also In re Federal-state Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, 13 F.C.C.R. 11830, ¶ 45 (1998) ("*Universal Service Report to Congress*") ("Congress intended the 1996 Act to maintain the *Computer II* framework."); *Id.* ¶ 39 ("Congress built upon . . . *Computer II*.").

[142] *Universal Service Report to Congress* ¶ 69 n.138.

[143] *Non-Accounting Safeguards Order* ¶ 132.

[144] *Id*. ¶ 134.

[145] *Id*.

Thus, in the first order in the Section 706 proceeding, the Commission held that the BOCs remain obligated to unbundle and make available to competing information service providers:

> (1) the network services that underlie the BOC's own information services (pursuant to the *Computer Inquiry* proceedings); and (2) additional network services that the BOCs do not use in their information service offerings (pursuant to ONA). We note that BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.[146]

The Commission reiterated these principles in its second order in the Section 706 proceeding. There the Commission concluded that what it called "bulk DSL services" sold to ISPs "are telecommunications services, and as such, ILECs must continue to comply with their basic common carrier obligations with respect to these services."[147] These obligations include "providing such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements."[148]

More recently, in the *CPE/Enhanced Services Bundling Order*, the Commission clarified that facilities-based carriers may offer bundled packages of enhanced services and basic telecommunications at a single price, subject to existing safeguards.[149] The

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[146] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability Telecommunications Act of 1996*, 13 F.C.C.R. 24012, ¶ 37 (1998) ("*First 706 Report*").

[147] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 Communications Reg. (P&F) 407, ¶ 21 (1999), *aff'd in part, vacated in part and remanded, GTE Servs. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) ("*Second 706 Report*").

[148] *Id*.

[149] *CPE/Enhanced Services Bundling Order* ¶ 1.

Commission once again emphasized, however, that its decision rested on the "fundamental provisions" contained in the *Computer II* and *Computer III* decisions, "that facilities-based carriers continue to offer the underlying transmission service on nondiscriminatory terms, and that competitive enhanced services providers should therefore continue to have access to this critical input."[150] The Commission stressed that it retained the unbundling requirements "to ensure that competitive enhanced service providers continue to have non-discriminatory access to the underlying transmission capacity."[151] In particular, "the separate availability of the transmission service is fundamental to ensuring that dominant carriers cannot discriminate against customers who do not purchase all the components of a bundle from the carriers themselves."[152] The FCC's suggestion that the 1996 Act is in tension with the *Computer Inquiry* cases is revisionist history and, if adopted, would be both legally unsustainable and bad policy.

2. Broadband Only Represents an Incremental Evolution of the Existing Local Exchange Network

The Commission next suggests that the *Computer Inquiry* rules should not apply to the regulation of broadband information services because these broadband services are different from anything previously regulated pursuant to those rules.[153] That is a profoundly misguided suggestion. Dial-up Internet access and DSL-based Internet access utilize the same bottleneck local network facilities and infrastructure.

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[150] *Id.* ¶ 12.
[151] *Id.* ¶ 39.
[152] *Id.* ¶ 44.
[153] *NPRM* ¶ 36.

"DSL" is not a new and different telephone network. Instead it refers to a family of related protocols that allow data to be transmitted over existing copper transmission facilities at relatively high bit rates. For all relevant regulatory purposes, DSL is no different than dial-up service.

As the chart below illustrates, transmission is accomplished through sets of standards and rules that specify how communication will take place through some physical medium:[154]

Layer 7: The Application Layer
Layer 6: The Presentation Layer
Layer 5: The Session Layer
Layer 4: The Transport Layer
Layer 3: The Network Layer
Layer 2: The Data Link Layer
Layer 1: The Physical Layer

The telecommunications industry has divided these transmission protocols into various "layers" to permit engineers to develop compatible communications technologies.[155] At the first layer is the physical medium itself, in this case a copper wire. Electrical signals travel across copper as analog waves of varying height or amplitude, and at varying frequencies.

[154] Graham Decl. ¶ 8.

[155] Graham Decl. ¶¶ 5-7.

For communications to take place over a copper wire, data needs to be translated into a pattern of waves, transmitted across the copper, and then translated back into data at the receiving end of the transmission. The first protocol layer also includes standards that directly mediate between the physical medium and the information to be communicated over that medium. It determines, for example, whether the information is to be encoded in analog or digital form, and how the information is to be represented in wave patterns transmitted over the copper. DSL primarily is such a layer one protocol – it translates digital signals sent by a computer into wave patterns, and then translates those wave patterns back again into a digital signal at the other end of the copper transmission facilities. A dial-up modem does precisely the same thing – it converts data on a computer into a pattern of waves.[156]

The DSL signals, or dial-up-modem-formulated signals, then are organized through additional sets of rules defined in higher layers of protocol. Each of these protocols is designed to allow information to be organized and than routed efficiently from one place to another. They do not change the content of that traffic. A data file on a web page might be sent to a computer and downloaded. It might travel over fiber and copper, over an ATM network, over DSL when it travels over the copper, and in an IP/TCP protocol, but the file on the web page is the same as the file downloaded on the computer. The content of the data file is not changed. Exactly the same is true of traffic carried by a dial-up modem.

DSL-based transmission differs from dial-up modem transmissions principally in the speed of the transmission. DSL technologies are specially designed to make use of

[156] *Id.* ¶ 8.

the copper wire's ability to transmit high frequency signals in the range of 10kHz to 1.0mHz. DSL thus achieves relatively high transmission speeds over copper loops by not restricting itself to the 0-4kHz frequencies used for voiceband communications (including dial-up modem communications).[157]

The thrust of the *Computer Inquiry* cases was that bottleneck transmission facilities need to be shared in order for there to be a competitive information services market. The fact that DSL modems use the high frequency portion of a copper loop to send digital signals, while dial-up modems use low frequency portion of the same loop to send an analog signal, is entirely irrelevant to a consideration of the bottleneck nature of the loop facilities that both technologies depend upon. The relevant consideration is that the bottleneck transmission facilities needed to provide broadband information services are the same as the bottleneck transmission facilities needed to provide narrowband information services. Both rely on the same copper loop, and its bottleneck status does not vary with the nature of the protocols used to carry traffic across the loop. There is no justification for subjecting these copper loops to a different regulatory regime when they are transmitting signals using a DSL-based protocol than when they are using a dial-up modem service.

Indeed, while consumers understand "broadband" to mean high-speed Internet access services, it is not a useful way to categorize the telephone network for regulatory purposes. Transmission is available at varying capacities, and used for a variety of purposes. For example, "narrowband" voice services can be provided on so-called "broadband" fiber facilities, and DSL technology makes it possible to convert a two-wire

[157] Graham Decl. ¶¶ 11, 19-26.

copper loop to a high-speed facility. Some kinds of services (such as streaming video), to be sure, currently require a specified amount of transmission capacity, and other services (such as downloading web pages) operate more quickly when carried over "broadband" facilities. But because technology changes, services cannot sensibly be associated only with particular facilities or bandwidth requirements. Thus new V.92 "narrowband" modems are always-on dial-up modems that provide so-called "broadband" download speeds.[158] Congress in the 1996 Act and this Commission have properly focused their regulatory attention on the facilities that create bottlenecks. They left it to the market to determine what kinds of services would be best provided over those facilities. The entire notion of an NPRM devoted to the regulatory status of "broadband Internet access service facilities" is misguided.

Neither are there different commercial relationships involved in retail markets for broadband or narrowband Internet access services. Because they use the same basic facilities to deliver similar services, telephony-based Internet access services are provided to consumers in the much the same way, whether they utilize broadband or narrowband connections. The ILECs provide broadband Internet access to residential customers almost exclusively via their Internet service provider affiliate or operation. The residential customer in that instance purchases the high-speed Internet access service from an ISP, albeit one typically affiliated with the ILEC. In all important respects – and much like the more familiar narrowband world of dial-up Internet access – it is the ISP (either ILEC-affiliated or independent) that markets, sells, and provides retail high-speed Internet access directly to its customers. In contrast, the ILEC – in its familiar role as

[158] *See, e.g.*, http://www/ISP-Planet.com, V.92 Appeals to Dial-Up Users.

telecommunications carrier – merely provides the DSL-based data transport service to ISPs, including its own.

The only relevant "service characteristic"[159] of Internet access service for present purposes is whether the broadband transmission component can be unbundled from the information services that ride upon it. As to that, nothing about services over copper loops with DSL electronics is any different than copper loops using any other different transmission protocol. No technological developments warrant reconsideration of the *Computer Inquiry* cases.

3. There Is No Viable Intermodal or Intramodal Competition

Finally, the Commission appears to presume that sufficient competition exists between different "modalities" to prevent the ILECs from using their control over DSL transmission services to discriminate against ISPs in the wireline broadband market. This view, too, is without any factual foundation.

The appropriate focus of analysis in this proceeding is the upstream market for DSL transport functionalities provided by LECs to ISPs, over which high-speed Internet access services can be offered. As we indicted above, ISPs currently have no choice but to utilize ILEC inputs to provide their internet access services.[160] There is no ubiquitous data CLEC presence in the residential market, and CLECs providing these telecommunications services are themselves entirely dependent upon ILEC bottleneck facilities. There also is no general "open access" requirement applicable to cable modem

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[159] *NPRM* ¶ 43.

[160] *See supra* pp. 33-38.

plant. As a result, there is no realistic competition for underlying transmission services. Directly or indirectly, ISPs have no choice but to use the ILECs.

Given the goals of the Telecommunications Act, the similarity of narrowband and broadband services and technologies, and the lack of intermodal and intramodal competition – the Commission's *Computer Inquiry* requirements remain entirely valid in the broadband context, and should be retained in their entirety.

B. The FCC Should Significantly Revamp or Eliminate the ONA and CEI Rules

The ONA and CEI rules adopted in the Commission's *Computer III* proceeding and subsequently modified have not been successful. Few ESPs take advantage of the federal ONA program, or at most do so in a very limited way. ONA, rather than offering diverse ways for ESPs to use advanced capabilities on an unbundled basis to provide new services to the American consumer, instead has degenerated into a poor excuse for the BOCs to provide enhanced services on an integrated basis and abuse their telecommunications bottleneck.

Much of the problem lies with the way the Commission allowed the BOCs to implement ONA. Between the lack of fundamental unbundling, and the excessive prices for ONA capabilities, ESPs find little in ONA that is attractive or useful. In particular, the Basic Serving Arrangement ("BSA") was established as an unbundled substitute for Feature Group service. Unfortunately, the Commission largely retained the bundled aspect of Feature Group service when it adopted the BOCs' ONA proposals.

In the early 1990s, ESPs asked the Commission to allow them to take federally-tariffed access arrangements that were cost-based and designed for the unique needs of

ESPs. By agreeing to consider taking interstate access arrangements for the first time, ESPs were hoping to be able to take advantage of advanced federally-tariffed network functionalities being offered by the BOCs under the rubric of ONA. In a 1991 decision, the Commission decided otherwise, finding that a cost-based interstate access arrangement designed for ESPs would be "inconsistent with our current rate structure," and that there was no reason to deviate from that rate structure "for one group of access users."[161] As a result, the so-called ESP "exemption" from interstate access charges remains in place to this day.

Thus, when the Commission adopted ONA, it mistakenly retained both the bundled aspect of Feature Group service and all the costs associated with the bundled features. In essence, a BSA became synonymous with Feature Group service, and would cost just as much. Obviously no ESP with any business sense would willingly abandon its use of state-tariffed business lines in order to pay the excessive access charge rates that came with using a bundled federal access arrangement.

In 1997, the Commission correctly observed that the unbundling requirements imposed by section 251 of the 1996 Act, and the Commission's own implementing rules, "are essentially equivalent" to the "fundamental unbundling" requirements proposed by a number of parties in the early phases of the ONA proceeding.[162] These parties sought permission to receive unbundled loops, switching functions, interoffice transmission, and signaling. Again, as in the case of BSA pricing, the Commission rejected these

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[161] *Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 F.C.C.R. 4524, ¶ 62 (1991), *modified by* 8 F.C.C.R. 2104 (1993).

[162] *In re Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 F.C.C.R. 6040, ¶ 31 (1998) ("*Further Notice*").

proposals, calling them "premature." It is now past time to implement such an unbundling regime, which would benefit from the Commission's experience under section 251(c).

In its 1997 comments to the Commission in a related proceeding, WorldCom explained why ESPs need a new, cost-based ONA regime designed specifically for ESPs.[163] WorldCom observed there that, rather than imposing on ESPs interstate access charges in their current, subsidy-ridden form, the Commission should bring those charges down to their economic cost.[164] As part of this process, WorldCom urged the Commission to create a cost-based federal interconnection arrangement that ESPs could choose to utilize. This would allow ESPs, for the first time, to gain access to an array of advanced, federally-tariffed network features and functionalities that they have sought for many years. Any federal access arrangement that is created for data services must be unbundled to the maximum extent possible, stripped of all superfluous features and functionalities not desired or used by ESPs. It also must include flat-rated charges for all non-traffic sensitive facilities. Nothing in WorldCom's proposal would require ESPs to alter their current network arrangements, or abandon their use of state-tariffed business lines.

In sum, the Commission should impose real ONA requirements on the ILECs. By establishing appropriate piecing and unbundling requirements, based on the 1996 Act rules, the Commission can create an effective federal interconnection regime that would greatly benefit consumers. Such an interconnection regime also would go a long way

[163] Comments of WorldCom, CC Docket No. 96-263, filed March 24, 1997 ("WorldCom ISP NOI Comments").

[164] WorldCom ISP NOI Comments at 11-13.

towards responding to the Ninth Circuit's concerns that the Commission lacked a substantial basis to remove the structural separations of *Computer II*.

III. THE APPROPRIATE CONSTRUCTION OF THE ACT'S DEFINITIONS OF "TELECOMMUNICATIONS SERVICE" AND "INFORMATION SERVICE"

The Commission asks how to categorize Internet access service, both generally and when an ILEC provides this service over its own bottleneck facilities. In particular, it asks whether Congress, through the definitional sections of the 1996 Act, created a loophole that allows the BOCs to use their last-mile bottleneck facilities free of Title II constraints whenever they use those facilities in part to carry information services and bundle any offered telecommunications services with those information services. Since the ILECs always at least offer information services along with their telecommunications services, the creation of such a loophole risks rendering Title II and Congress' Title II laws irrelevant.

We take each of the Commission's proposals in turn. First, we discuss the Commission's tentative conclusion that Internet access service is an information service. Then we address the tentative conclusion that such a service is "telecommunications," but not a "telecommunications service," even when the ILEC self-provisions the telecommunications component of the service. We also address the assertion that carriers are not "telecommunications carriers" subject to Title II to the extent they provide information services. We then take up the Commission's suggestion that because information services are not telecommunications services, the last-mile facilities used to

provide such services cannot be "network elements." Finally we turn to the appropriate construction of section 251(c)(3) in light of these statutory definitions.

It is critical to note at the outset that nothing about the "information services" definition, or its application here, has anything at all to do with whether the Internet access service being considered is a "broadband" service provided over a DSL modem, or whether it is the more common dial-up Internet access service. Rather, these and the other discussed definitions and their regulatory consequences apply fully to all telecommunications services and all information services, whether they are provided over broadband capable or narrowband facilities. No distinctions between the regulatory treatment of traditional POTS services and broadband services can be maintained based on the definitions and other statutory provisions the Commission is reviewing in this *NPRM*. To the extent the Commission believes that the questions it asks relate only to broadband access, it is mistaken. Congress did not make the distinction the Commission is now trying to draw, so that any rule must apply to all services whatever the bandwidth.

A. Internet Access Service Is an Information Service

We agree that Internet access service providers provide "information services." The Act defines "information service" as the offering of the capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications."[165] The abilities to store files, to establish web pages, to cache information obtained from the Internet, and to provide similar services plainly fall within this definition of information services.[166] We also agree with the

[165] 47 U.S.C. § 153(20).

[166] *NPRM* ¶ 22. *See also Universal Service Report to Congress* ¶¶ 73-82.

Commission that these functionalities remain information services whether the Internet access service provider is purchasing transmission facilities from a third party or using its own facilities. Nothing about the ultimate source of the transmission facilities changes the nature of the information services provided to the end user.[167]

B. DSL Transmission Service Is a Telecommunications Service

The Commission has consistently maintained that when a carrier provides broadband transmission on a stand-alone basis, without a broadband Internet access service, it is providing a telecommunications service.[168] It should reaffirm that conclusion here.

"Telecommunications service" is defined as an offering of "telecommunications" to the public for a fee.[169] "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without regard to change in the form or content of the information as sent and

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[167] *NPRM* ¶ 24 & n.58 (citing *Universal Service Report to Congress* ¶ 69, n.138). Whether Internet access service providers provide *only* information services is a more difficult question. *See infra* pp. 69-73

[168] *NPRM* ¶ 26 & n.60, citing *Advanced Services Order*, 13 F.C.C.R. 24012, ¶ 35 (1998). *See also Universal Service Report to Congress* ¶ 15 ("the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications'"); *Second 706 Report* ¶ 21 ("bulk DSL services sold to Internet Service Providers are . . . telecommunications services, and as such, ILECs must continue to comply with their basic common carrier obligations with respect to these services."); *id.* ¶ 35 ("xDSL and packet switching are simply transmission technologies"); *id.* ¶ 36 ("in [the case of Internet access], we treat the two services separately: the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access."); *In re GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C.R. 22466, ¶ 16 (1998) ("*GTE DSL Tariff Order*"). *See also, e.g.*, SBC Comments in Support of its Application for InterLATA Authority for Arkansas and Missouri, FCC No. at 54-58 (Aug. 20, 2001) (DSL transport service is a telecommunications service).

[169] 47 U.S.C. § 153(46).

received."[170] When a carrier is offering DSL transmission services to the public for a fee, it is providing "telecommunications services."

As we described in the previous section,[171] DSL is a transmission protocol that organizes the way electrical signals are carried across a copper wire. The form and content of material is not changed as a result of it traveling over DSL-based transmission facilities. When a carrier offers to carry traffic from one point to another using DSL-based technology, it is plainly offering a telecommunications service.

C. ILEC Self-Provisioned Internet Access Service Is Also a Telecommunications Service

The Commission tentatively concludes that ILEC bottleneck transmission facilities lose their common carrier characteristics when the ILEC uses them as an input to its own Internet access service. The Commission should reject this view. First, the ILEC's transmission facilities serve an identical transmission function regardless of whether the ISP is the ILEC or some third party. The ILEC should not be allowed to opt into or out of common carrier status as it chooses by the way it tariffs (or declines to tariff) its services. Second, as a regulatory matter, *Computer II* requires that there will always be an identifiable telecommunications service in this situation, and even if the Commission abandons *Computer II*, Congress fully incorporated the *Computer II* paradigm in its statutory definitions of "information service" and "telecommunications service." Third, that construction best comports with those definitions' terms. Fourth, and in any event, even if the Commission were for some reason to ignore the fact that the ILEC is providing an identifiable telecommunications service, the ILEC ISP is itself

[170] *Id.* § 153(43).
[171] *See supra* pp. 47-51.

providing a telecommunications service when it makes use of its own bottleneck transmission facilities.

1. ILECs Provide Telecommunications Services Even When They Provide Them to Themselves or to Their Affiliated ISP

In the most common configuration, the telephone company that provides the underlying transmission facilities is the *provider* of the telecommunication services to the ISP, the ISP is the *user* of those telecommunications services, and the end-user customer is the *user* of the ISP's information services, a component of which is the telecommunications purchased from the telephone company. In considering that paradigmatic case, the Commission on several occasions has stated that from the end user's point of view, to the extent that it is purchasing information services from an ISP, it is *not* at the same time purchasing telecommunications services from the ISP. Instead, it is purchasing information services, which it is receiving "via telecommunications,"[172] which the ISP has in turn purchased from the telecommunications carrier.[173] The rule that a service cannot be both an information service and a telecommunications service at the same time in this paradigmatic case was not intended as a technical description of services provided; instead it serves to allocate regulatory responsibilities sensibly among the ISP and the telecommunications carrier. The facilities provider is subject to interconnection and unbundling requirements, and the ISP, which controls no bottleneck facilities, is not.

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[172] 47 U.S.C. § 153(20).

[173] *See, e.g., Universal Service Report to Congress* ¶ 69; *In re Implementation of the Non-accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended,* 16 F.C.C.R. 9751, ¶¶ 5, 36-37 (2001) ("*Non-Accounting Safeguards Remand Order*").

This same formulation ought to apply when the ILEC provides the underlying transmission services to its affiliated ISP, or to itself acting as an ISP. The ILEC still is providing transmission services to the ISP, which is still providing information services. The ILEC still controls bottleneck transmission facilities, and all of the reasons that such facilities require regulation apply fully, regardless of the identity of the ISP.

For that reason, the FCC always has separately identified the ILEC-provided common carriage that underlies the ILEC's information services offering.

> In fact, the *[Universal Service] Report to Congress* recognized that in cases in which an information service provider owns the underlying transmission facilities, and engages in data transport over those facilities in order to provide an information service, one could argue that the information service provider is "providing" telecommunications to itself by furnishing raw transmission capacity for its own use.[174]

Until now the Commission has acknowledged the fact that the ILEC self-provides an underlying transmission service because "the separate availability of the transmission service is fundamental to ensuring that dominant carriers cannot discriminate against customers who do not purchase all the components of a bundle from the carriers, themselves."[175]

The Commission now proposes to abandon this critical distinction suggesting for the first time that the Act's definitional provisions foreclose it. In the Commission's tentative view, when a BOC offers Internet access services over its own facilities, it is not

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[174] *Non-Accounting Safeguards Remand Order* ¶ 38 (citing *Universal Service Report to Congress* ¶¶ 15, 69).

[175] *CPE/Enhanced Services Bundling Order* ¶ 44.

offering "telecommunications for a fee directly to the public," and so is not offering a "telecommunications service."[176]

On further reflection, the Commission should reject this unwarranted departure from its existing rules that would free ILECs from their Title II obligations whenever they decide to bundle information services along with their telecommunications services. Rather than allocating responsibilities among an ISP and a carrier, the Commission's proposal could lead to the conclusion that there is no telecommunications service being provided at all when the ILEC self-provisions transmission services. The rule thus would be converted from one that allocates regulatory responsibilities into one that eliminates those responsibilities altogether.

As we previously discussed, common carriage is a concept that applies to producers of goods or services to which the public needs access. Whether or not a communications operator is a common carrier under the Act depends on a two-part test: "first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the service] to expect an indifferent holding out to the eligible user public."[177]

According to this definition, the degree of monopoly control held by the communications operator is a central inquiry in determining whether or not the operator should be subject to regulation as a common carrier. As the Commission has interpreted *NARUC I*, whether an operator has a legal compulsion to serve all customers indifferently depends on "whether the public interest requires common carrier operation" of a

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[176] *NPRM* ¶¶ 25, 61.

[177] *NARUC I*, 525 F.2d at 642 .

particular facility.[178] The public interest analysis in turn depends on whether an operator "has sufficient market power to warrant regulatory treatment as a common carrier."[179] In contrast, where "sufficient alternative facilities, including common carrier facilities, are available [an operator] would be unable to charge monopoly rents and hence would not have market power."[180]

It would be totally at odds with this concept to rule that a common carrier may discriminate in favor of its own affiliate – or itself – and deny bottleneck services to others, and then claim that for that very reason it is not a common carrier. Common carriers are not free to choose to become or not to become common carriers as they see fit, for "[t]he common carrier's duty to serve all indifferently cannot be lessened by a violation of that duty."[181] The term is simply not self-defining in that sense, for if it were, it would be devoid of all substance. For that reason, common carriage cannot be based entirely on "the intentions of a service provider," because such an approach would ignores an agency's "determination to impose a legal compulsion to serve indifferently."[182] Nor could Congress possibly have intended such a result – when it adopted common carrier rules it did not make them voluntary.

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[178] *In re Cable & Wireless, PLC Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable*, 12 F.C.C.R. 8516, ¶ 15 (1997).

[179] *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21585 ¶ 9 (1998), *aff'd, Virgin Islands Tel. Corp. v. United States*, 198 F.3d 921 (D.C. Cir. 1999).

[180] *Id.*; *accord In re FLAG Pacific Ltd. Application for a License to Land and Operate in the United States a Digital Submarine Cable Sys. Between the United States and Canada and Japan and Korea*, 15 F.C.C.R. 22064, ¶ 7 (2000) (public interest analysis focuses on whether an operator "will be able to exercise market power because of the lack of alternative facilities").

[181] *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739-40 (5th Cir. 1960).

[182] *Computer II* ¶ 122.

2. Congress Intended the Act's Definitional Sections To Be Construed in Harmony with the *Computer Inquiry* Rules

Moreover, *Computer II* prohibits just such discriminatory conduct by an ILEC, and Congress incorporated this bedrock principle of *Computer II* into the Act's structure and definitions. Under *Computer II*, facilities-based telecommunications carriers with market power offering enhanced services must always "acquire transmission capacity for their own enhanced services operations under the same tariffed terms and conditions as competitive enhanced service providers."[183] Thus a carrier complying with *Computer II* always will be offering the underlying transmission as "telecommunications for a fee directly to the public," and so would always be offering a "telecommunications service." The statutory conundrum the Commission postulates could only arise in a world in which this "cornerstone" of *Computer II* has been abandoned.[184] And, as we discussed,[185] while the Commission contemplates certain changes to the *Computer* regime, it would be profoundly unwise to abandon the basic premise of that regime.

Moreover, as the Commission has repeatedly held, it is improper to engage in statutory construction of the 1996 Act as if the *Computer* rules did not exist. "Congress intended the definitions of 'telecommunications,' 'telecommunications service' and 'information service' to build upon the frameworks established prior to the passage of the 1996 Act, including the MFJ and Commission precedent."[186] The contrasting definitions

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[183] *CPE/Enhanced Services Bundling* ¶¶ 4, 42-43.

[184] *See CPE/Enhanced Services Bundling Order* ¶ 2.

[185] *Supra* pp. 42-56.

[186] *Non-Accounting Safeguards Remand Order* ¶ 29. *See also Universal Service Report to Congress* ¶ 45 ("Congress intended the 1996 Act to maintain the *Computer II*

of "information services" and "telecommunication services" only make sense in a world where the "telecommunications" that underlies an information service is itself offered as a "telecommunications service," as required by *Computer II*. As the Commission has said in previously considering these statutory definitions, "[o]ur analysis here rests on the reasoning that under this *[Computer II]* framework, in every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications."[187]

Nor would Congress have imposed the much more onerous structural separation requirements of sections 271 and 272 on all interLATA services, including information services,[188] if it believed that the transmission facilities that underlie all information services should not be subject to any regulation whatsoever.

Because in drafting the Act's relevant definitions Congress assumed that information services will always be carried "via" a separately tariffed telecommunications service, the definitions do not expressly deal with the possibility that there would be no such tariffed service. The Commission's proposal, however, turns on its head Congress' unstated assumption that the *Computer* framework applied, and reads its silence as evidence that Congress was affirmatively abandoning that framework. That view is mistaken.

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framework."); *Universal Service Report to Congress* ¶ 39 ("Congress built upon . . . *Computer II*.").

[187] *Universal Service Report to Congress* ¶ 69 n.138.

[188] *See Non-Accounting Safeguards Remand Order*.

The Act's legislative history powerfully supports our understanding of legislative intent. The definitions of "telecommunications" and "telecommunications service" came from the bill that passed the Senate.[189] And, as the Senate Report explained, those definitions were expressly intended to incorporate the *Computer Inquiry* framework that there is always "telecommunications service" underlying every "information service." Thus, the report explains, the bill excluded from the definition of "telecommunications service" "those services . . . that are defined as information services."[190] The report goes on to specify that "[t]he underlying transport and switching capabilities on which these interactive services are based, however, are included in the definition of 'telecommunications services.'"[191] The Report also specified that the definition of "telecommunications services" "does not include information services . . . but does include the transmission, without change in the form or content, of such services."[192] In other words, Congress understood that there would always be a telecommunications service underlying an information service. The Commission's suggestion that Congress must have intended the opposite cannot be squared with this legislative history.

3. Construing the Act's Definitional Provisions in Harmony with the *Computer Inquiry* Rules Also Best Comports with Their Plain Meaning

Although Congress felt no need to specify that carriers that self-provisioned transmission facilities are providing telecommunications services, nothing in the plain

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[189] *See* Conf. Rep. No. 104-458, at 116 (1996) ("The House recedes to the Senate with amendments with respect to the definitions of . . . 'telecommunications' . . . and 'telecommunications service.'").

[190] S. Rep. No. 104-23, at 18 (1995).

[191] *Id.*

[192] *Id.*

words of the statutory definitions suggests any contrary understanding. Indeed, the most natural reading of those definitions is fully in accord with Congress' purpose in drafting them.

The ILECs traditionally have offered DSL-based transmission services "for a fee directly to the public." These services are classic transmission services that fall squarely within the definition of "telecommunications services."[193] Nothing in this statutory definition suggests that an ILEC's offering would *stop* being a "telecommunication service" merely because the ILEC refuses to deal with the public generally and begins only to deal with itself.[194] The definition of "telecommunications service" was intended to incorporate the common-law requirements of common carriage, and nothing in the words that Congress chose could plausibly be read to work such a radical constriction of those common carrier principles. Neither the statutory text nor its legislative history even hints at such a revolutionary purpose. When a facilities-based carrier self-provisions transmission as part of its ISP affiliate's information service, the carrier should be understood to be providing a "telecommunications service."

Even if the definition of "telecommunications service" was improperly understood to leave it entirely to the carrier's own discretion whether to provide a telecommunications service, in the situation postulated by the Commission, the ILEC plainly is offering telecommunications services to its ISP, which in turn is offering them to the public. In that case, if the carrier has the right to choose not to offer

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[193] 47 U.S.C. § 153(46).

[194] Regardless of the merits of the Commission's conclusion that cable transmission facilities are not common carrier facilities, in this regard there is a clear distinction between wireline facilities, which have always been understood to be common carrier facilities, and cable facilities, which have not. *See Cable Declaratory Ruling* ¶¶ 43-44.

telecommunications "*directly* to the public," it is in any event offering them "to such classes of users as to be effectively available directly to the public."[195] Indeed, that statutory language seems to describe exactly the relationship between the carrier, the ISP and the end user when the carrier and the ISP are the same entity. Similarly, if the ILEC directly were to offer Internet access services, it is still a facilities-based carrier with market power, and is offering telecommunications services to itself, a "class of users" that effectively makes the service available to the public.

Finally, the fact that DSL-based services could be characterized as complex communications technologies commonly offered through individual contracts – even if that were true – does not make them "private carriage." "If the analysis of where to draw th[e] line [between common and private carriage] centered solely on the complexities of the technology itself, carriers could argue that virtually any technically complicated communications service requiring customer-specific solutions is provided through private carriage. A carrier cannot vitiate its common carrier status merely by enter into private contractual relationships with [its] customers." [196] Certainly, the DSL technologies involved are no more "complex" than the frame relay technologies that the Commission properly characterized as common carrier transmission services.

In any of these ways, applying the Act's definitions, a facilities-based telecommunications carrier is providing "telecommunications services" when its ISP provides information services "via" those telecommunications, or when it acts directly as an ISP providing these services.

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[195] 47 U.S.C. § 153(46) (emphasis added).

[196] *In re Independent Data Communications Manufacturers Ass'n, Inc.*, 10 F.C.C.R. 13717, ¶ 52 (1995) ("*Frame Relay Order*").

4. An ISP That Provides Its Own Bottleneck Transmission Facilities Is Providing a Telecommunications Service as Well as an Information Service

Alternatively, when the service offering of an ISP that is providing Internet access services over its own bottleneck facilities is considered discretely, that facilities-based ISP is itself directly providing a telecommunications service to the public for a fee. It is not the case that every component of that public offering is only an information service. While many of the applications provided in an Internet access service are indisputably information services, much of what the end user values in an Internet access service is raw, unadulterated transmission that connects his or her computer to the Internet, along with the necessary transmission protocols that "facilitate the economical, reliable movement of information" over the transmission medium.[197] These are a classic telecommunications service.[198]

The fact that the telecommunications service is invariably bundled with information services such as home pages, web pages, and e-mail storage does not alter its basic identity as a telecommunications service. While *those* information services are provided "via telecommunications," the self-provisioning ISP also directly provides a telecommunications service.[199] "Telecommunications services" and "information services" are distinct offerings from a regulatory perspective, but a telecommunications

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[197] *Frame Relay Order* ¶ 33.

[198] *Id.* (frame relay a basic service even though service makes changes to frame header).

[199] *See Non-Accounting Safeguards Remand Order* ¶ 38 (noting that while FCC held that ISPs "*generally* do not provide telecommunications," that "reflects the Commission's finding that at that time most information service providers were not also telecommunications service providers," and that the Commission "le[ft] room for a different conclusion in specific situations") (emphasis in original).

service does not disappear when it is coupled with an information service. "[A]n otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[200] Some entity is providing the telecommunications service to the end user. If the Commission were to conclude that an information service provider has not purchased bottleneck common carrier telecommunications services from someone else, then it most certainly is providing them itself.

The basic obligations of every telecommunications carrier to share bottleneck transmission facilities cannot be avoided by bundling telecommunications services with advanced services. While the Commission has treated such a bundled offering as one enhanced service when it is provided by a non-facilities-based enhanced service provider,[201] the Commission also has long held that such "contamination," whereby telecommunications services lose their common carrier characteristics when they are bundled with enhanced services, cannot be applied "to the services of . . . [a] facilities based carrier," controlling bottleneck facilities, since to do so "would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework."[202]

Were it otherwise, a facilities-based telecommunications carrier "would be able to avoid *Computer II* and *Computer III* unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable

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[200] *GTE DSL Tariff Order* ¶ 20 (quoting *ONA Plans Order* 4 F.C.C.R. 1, 141 (1988)).
[201] *Frame Relay Order* ¶ 42.
[202] *Id.* ¶¶ 42-44.

and unintended result."[203] For that reason, the fact that "the enhanced [Internet access services] associated with the" facilities-based carrier's transmission services "bring it within the definition of an enhanced service is beside the point."[204]

The Commission at times has suggested to the contrary that the telecommunications component of Internet access service is not bundled with information services in the way that enhanced and basic services are typically bundled together. For that reason, perhaps, the Commission has not applied the usual "contamination" rules in this context. Instead, the telecommunications component of Internet access service mystically disappears entirely and cannot be separately identified, because it is "inextricably intertwined" with information services.[205] This unique information service, the Commission has suggested, cannot be "de-contaminated."

But this argument is better suited to an alchemist than a regulator. Technically it is not difficult to separate the transmission layers provided by Internet access service from the web hosting, e-mail and other information services carried over those transmission protocols.[206] And as a conceptual matter, the distinction between transmission and information service is no more difficult to apply in this context than in any other context.

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[203] *Id.* ¶ 44.

[204] *Id.* ¶ 41. *See also Universal Service Report to Congress* ¶ 60 (discussing "complicated" situation present when a facilities-based provider "is providing two distinct services, one of which is a telecommunications service," and noting "that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail").

[205] *Universal Service Report to Congress* ¶ 80. *See also id.* ¶ 56 (Internet access service is "inseparable" from the information service).

[206] Graham Decl. ¶¶ 26, 31

Instead, any decision to treat this kind of "mixed" service different than every other kind of "mixed" service is simply a regulatory choice – in this case a choice to apply the contamination theory to information service providers even when they use their own bottleneck transmission facilities to provide information services. But the Commission's long-standing decision to the contrary that contamination theory should *not* be applied in this context because it would lead to the deregulation of bottleneck facilities applies fully in this context as in all others.

In sum, the decision to abandon a policy the Commission has previously found "obviously" necessary to avoid the "undesirable" deregulation of last-mile bottleneck facilities[207] cannot be defended on the ground that telecommunications magically vanishes and cannot be separately regulated when the information service provided is Internet access. The last-mile bottleneck is as much of a problem in this context as in any other, and it cannot be made to disappear by such regulatory sleight of hand. [208] And while the Commission may choose to put off the "problem" of Internet telephony until another day, a regulatory classification of Internet access service that is incapable of dealing sensibly with this telecommunications service obviously is deficient.

D. Congress' Unbundling Obligations Fully Apply to ILECs That Provide Information Services over Last-Mile Bottleneck Facilities

The Commission also asks about the consequences of its tentative conclusion that ILECs that provide Internet access services are not providing telecommunications services to the Act's Title II requirements. It asks, in that context, whether the ILECs' bottleneck facilities, insofar as they are used to offer information services, can be

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[207] *Frame Relay Order* ¶ 44.

[208] *See Non-Accounting Safeguards Remand Order* ¶¶ 17 n.41, 27.

"network elements" since they are not used to provide "telecommunications services." It also asks whether the unbundling required by section 251(c)(3) applies, since the bottleneck facilities are not used "for the provision of a telecommunications service."[209]

The short answer to these questions, as discussed above, is that the ILEC is *not* using its last-mile facilities only to provide information services, but in fact is also providing telecommunications services.

But even if the ILEC were seen as using the high-frequency portion of its loops to provide only information services, nothing in the definition of "network element" suggests that the *ILEC* is given the right to bring facilities into or out of that definition by declining to provide "telecommunications services" over those facilities. Carriers could if they choose offer telecommunications services over these loop facilities – indeed, as indicated above, the ILECs traditionally have used these very loop facilities to provide tariffed telecommunications services, and the CLECs also routinely offer telecommunications services over the high frequency portion of the loop leased from the ILECs. The definition of "network element" nowhere states that the facility has to be used *by the ILEC* in the provision of a telecommunications service. Under the statute, it is enough that the facility can be used to provide a telecommunications service.

Any construction of the "network element" definition that required that a facility had to be used by the *ILEC* to provide a telecommunications service would run counter to the Commission's understanding of the purpose of the Act's unbundling requirements: that competitors be allowed to fashion *their own* unique telecommunications services and information services in part using facilities leased by the ILEC, without regard to the uses

[209] *NPRM* ¶ 61.

the ILEC makes of those same facilities. The Commission found such differentiation of services provided over leased facilities to be one of the principal advantages to the Act's unbundling requirements.[210] For that reason, the Commission rejected ILEC arguments that "because dark fiber is transport that is not currently 'used' in the provision of a telecommunications service, . . . it does not meet the statutory definition of a network element."[211] Instead it found that facilities are "used in the provision of a telecommunications service" so long as they have been or are "customarily employed" for the purpose of providing a telecommunications service."[212]

Moreover, while the network element definition is silent as to which carrier must use the facility to provide a telecommunications service, that provision is applied in section 251(c)(3), where the statute is explicit that it is the *requesting carrier's* intended use of the facility that triggers the unbundling obligation. That provision reads that it is the ILEC's "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service" network elements. The manner in which the elements are provided must allow "requesting carriers . . . to provide *such* telecommunications service." Plainly, the "telecommunications service" twice referenced in section 251(c)(3) is the *CLEC's* telecommunications service. It is entirely irrelevant whether or not the ILEC is using the facility to provide a telecommunications service itself. And, since section 251(c)(3) is unambiguous in this regard, the only

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[210] *See, e.g., Local Competition Order* ¶ 333.

[211] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 F.C.C.R. 3696, ¶ 326 (1999), *modified by* 15 F.C.C.R. 1760 (1999) ("*UNE Remand Order*"). *See also id.* ¶¶ 327, 330.

[212] *Id.* ¶ 326.

plausible reading of the "network element" definition is that it too, must be concerned with facilities that the *CLEC* can use to provide a telecommunications service or an information service.[213]

The suggestion that the CLECs' rights to UNEs should be limited by the kinds of services the ILECs choose to offer over those facilities is, moreover, another variant of the "use restriction" proposal being considered by the Commission in the *Triennial Review*. For the reasons we identified in that proceeding, the Commission should reject this "use restriction" on unbundled network elements.

The Act broadly commands that the ILECs must "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access" to the individual elements of their networks.[214] Thus, the only restriction Congress imposed on the use of UNEs was to require that they be utilized at least in part "for the provision of a telecommunications service."[215] As long as a competitor uses the leased element in part to provide a telecommunications service, the FCC cannot further limit the uses to which the carrier puts those elements. As the Commission recognized in the *Local Competition Order*, while "[a] single network element can be used to provide many different services . . . Section 251(c)(3) does not

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[213] If the Commission adopts its proposed constructions of the statutory definitions, the ILECs also no doubt will resurrect their argument that they are not "local exchange carriers" when they provide advanced services, and therefore not "incumbent local exchange carriers" subject to the requirements of section 251(c) for their advanced services offerings. The Commission's rejection of this construction of the "local exchange carrier" definition was affirmed last year by the court of appeals, *WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001), and because the *NPRM* does not ask commenters to reconsider this construction, we will not further address it here.

[214] 47 U.S.C. § 251(c)(3).

[215] *Id.*

impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled network elements."[216]

Congress' intent to allow unfettered use of unbundled network elements is equally clear in the definition of "network element" itself. Congress defined that term broadly, to include "a facility or equipment used in the provision of a telecommunications service," including all "features, functions and capabilities that are provided by means of such facility or equipment."[217] As the Commission correctly understood when it issued the *Local Competition Order*, these two provisions in conjunction make clear Congress' intention that competitors should have the ability to use an unbundled telephone facility to provide any "capability" that facility is capable of providing.

Nor is it of any moment that CLECs combine these transmission facilities with their own information services to provide information services to consumers.[218] Although the 1996 Act's unbundling provisions are triggered by a CLEC's use of elements to provide telecommunications services, "telecommunications carriers that have interconnected or gained access under section . . . 251(c)(3) [also] may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a

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[216] *Local Competition Order* ¶ 264; *accord UNE Remand Order* ¶ 484. The ruling from the *Local Competition Order* was codified in 47 C.F.R. § 51.307(c) (requiring ILECs to provide access to UNEs "in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element"); and 47 C.F.R. § 51.309(a) (prohibiting ILECs from imposing restrictions on requesting carriers' use of UNEs).

[217] 47 U.S.C. § 153(29).

[218] *Local Competition Order* ¶ 995. *See also Further Notice* ¶ 32 n.98 (citing ¶ 995 with approval).

competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor."[219]

The ILECs nevertheless have urged the Commission to reverse course and adopt the contrary interpretation of these provision, insisting that the Commission should restrict the kinds of services that competitors can provide through leased facilities. In their view, section 251(d)(2) gives the FCC the authority to limit the uses to which unbundled network elements may be put. But that provision does no such thing. By its terms, section 251(d)(2) requires the FCC to determine *which* elements should be made available for lease, but says nothing at all about the uses to which competitors may put that element once they have leased it. The Commission got it right the first time: use restrictions are prohibited by the plain terms of the Act, and there is "no statutory basis upon which [the Commission] could reach a different conclusion for the long term."[220]

Use restrictions are not only unlawful, they are also anti-competitive. As we indicated above, and as the Commission has repeatedly found, the great advantage of unbundled network elements is that a single element can be used to offer a variety of services, allowing competitors to use an ILEC's network elements to offer services different from those offered by the ILEC. By depriving competitors of their ability to make full use of the UNEs they obtain from the ILECs, use restrictions would undermine

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[219] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C.R. 15499, ¶ 995 (1996) ("*Local Competition Order*"). *See also Further Notice* ¶ 32 n.98 (citing ¶ 995 with approval).

[220] *Local Competition Order* ¶ 356.

the pro-competitive goals that the unbundling provisions of the Act were designed to achieve.

Any rule that would allow competitors to use leased facilities for some purposes, but not for others, while the ILEC can use the same facility for all purposes, would place competitors at a significant disadvantage. Restricting the uses to which competitors can put network elements makes it impossible for them to achieve the same economies of scale and scope as the ILEC,[221] and thereby threatens to make leasing uneconomical for *any* service. No competitor could economically operate two redundant sets of facilities – one leased for services when the unbundled element has been approved for particular services, and one owned and operated in some other way for uses that have not been approved.

In sum, even if the Commission were wrongly to conclude that ILECs that provide Internet access services are not providing telecommunications services, that ruling would have no effect on the ILECs' continuing obligations under section 251(c)(3) to provide access to bottleneck facilities that CLECs intend to use to provide telecommunications and information services.

IV. THE FCC SHOULD NOT RELY ON TITLE 1 TO REGULATE INTERNET ACCESS SERVICES

The Commission asks whether it would retain the ability to regulate bottleneck transmission facilities pursuant to its Title I jurisdiction if it concludes that those facilities constitute an "information service."

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[221] The ability to use the same facilities to provide a multiplicity of services contributes significantly to the ILECs' ability to achieve the economies of scale and scope that are so critical to their success.

The Commission itself has recognized the risks of its proposed approach,[222] and it has reason to be concerned. Title I provides the Commission only an *ancillary* authority, conferring jurisdiction that "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities."[223] It is not an independent source of regulatory authority or a general grant of power that permits the Commission freedom to regulate activities over which the Commission is not expressly given jurisdiction.[224]

Any attempt to "regulate the Internet" under Title I thus will surely be opposed in the courts as an unlawful extension of the Commission's jurisdictional authority. Critics will correctly point out that the FCC has never attempted to use Title I to support any affirmative regulation of the type proposed here. Moreover, courts have set aside regulations premised on the Commission's Title I authority in cases in which the Commission has failed adequately to establish the nexus between the communication it wishes to regulate and the promotion or protection of an express Commission authority.

For example, the Supreme Court affirmed a decision setting aside Commission rules that compelled cable systems to provide common carriage of public originated transmissions, on the grounds that doing so would convert cable broadcasters into

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[222] *See NPRM* ¶ 61.

[223] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

[224] *See California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1989). *See also NARUC II v. FCC*, 533 F.2d 601, 613 & n.77, 617 (D.C. Cir. 1976) (noting that while § 151 of the Communications Act "does set forth worthy aims toward which the Commission should strive, it has not heretofore been read as a general grant of power to take any action necessary and proper to those ends," and that the "allowance of 'wide latitude' . . . in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer or explicitly denies.") (footnote omitted).

common carriers, an authority the Court concluded needed to come from Congress.[225] If the FCC concludes that when ILECs act as ISPs they too are not common carriers, that precedent would become an obstacle to imposing common carrier obligations on the ILEC ISPs. And, in another case involving the Commission's jurisdiction over cable service,[226] the Court of the Appeals for the District of Columbia Circuit rejected the Commission's claim that its pre-emption of state and local regulations concerning two-way, non-video communications was reasonably ancillary to its jurisdiction over broadcasting services. The Court had "great difficulty finding any . . . broadcast purpose which is served by the Commission's attempted pre-emption," and found that the Commission's "pre-emption [which would not increase the mix of available cable viewing choices] [did] not directly affect transmission in any medium which is of direct concern under the Commission's power over broadcasting."[227]

In contrast, where the Commission's Title I authority has been upheld, the courts have been able to identify a direct link between the regulation and a specific statutory responsibility. Thus, the courts have upheld the Commission's assertion of Title I jurisdiction over community antenna television as reasonably ancillary to effective performance of its responsibilities for the regulation of broadcasting,[228] and jurisdiction

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225 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979).

226 *NARUC II*, 533 F.2d 601 (1976).

227 *Id*. at 615.

228 *United States v. Southwestern Cable Co.*, 392 U.S. at 178.

over inside wiring as "reasonably ancillary to effective performance" of Commission responsibilities for regulation of interstate communication.[229]

Reviewing this precedent, the Commission itself has stated that its ancillary jurisdiction may be properly asserted *only* where it has "subject matter jurisdiction over the services and equipment involved, *and* the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction."[230] Applying this standard, the Commission exercised its ancillary jurisdiction over voice mail and interactive menus services (which the Commission has categorized as information services) where necessary to effectuate the purposes of sections 255 and 251(a)(2) of the Act concerning the accessibility of telecommunications services to the disabled. By contrast, the Commission declined to assert jurisdiction to any other information services, because, in the Commission's judgment, access to these other services (*e.g.*, e-mail and web pages) was not essential to making telecommunications services accessible to the disabled, and, by implication, not essential to implementation of sections 255 and 251(a)(2) of the Act.[231]

Ancillary jurisdiction here would be proper only if the Commission could demonstrate how the regulation of an integrated component of an information service that

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[229] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (9th Cir. 1989) (internal quotation marks and citation omitted).

[230] *See In re Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 F.C.C.R. 6417, ¶ 106 (1999) ("*Access to Telecommunications Service Order*") (emphasis added). *See also id.* ¶ 95 ("Ancillary jurisdiction may be employed, in the Commission's discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.").

[231] *Access to Telecommunications Service Order* ¶ 107.

it has gone to great pains to find is *not* a telecommunications services is essential to the protection or promotion of the Commission's regulation of telecommunications services under Title II of the Act. Because the regulation presumably would concern access to ILEC facilities, and because Congress expressly dealt with that subject in section 251 of the Act, the inquiry likely would have to be even narrower, requiring an examination of the extent to which regulation unanticipated by Congress was necessary to protect the operation of section 251. To survive scrutiny, the Commission would need to develop a credible and persuasive explanation setting out the nexus between the implementation of section 251 and the Commission's regulation of the non-common-carrier broadband offering.

The most obvious challenge to any such assertion of jurisdiction will be that the Commission would have determined (wrongly, in our view) that most sensible construction of the 1996 Act's definitions leads to the conclusion that Internet access services are not themselves common carrier services, a judgment that carries with it the understanding that Congress believed that no common carrier regulation of such services was appropriate. If the transmission component of Internet access service really is "private carriage," as the Commission suggests, it becomes difficult to explain why private carriage should be subject to any kind of regulation.

Moreover, the Commission's tentative (and incorrect) conclusion that the transmission component of Internet access service is "inextricably intertwined" with the information services component would leave the Commission with the deeply unpopular task of having to regulate directly the Internet itself, since any attempt to regulate only the underlying transmission would be inconsistent with the conclusion that this

transmission component could not be addressed separately under Title II. Finally, any attempt to impose Title I common carrier-type obligations on the ILECs different than the common carrier obligations Congress imposed in section 251 will surely be seen simply as an unlawful attempt to forbear from enforcing section 251(c) and to avoid the requirements of the 1996 Act. [232]

In sum, the Commission is digging itself a hole it will be difficult to climb out of. If the Commission believes that regulation of the ILEC bottleneck is still necessary (and it is difficult to imagine how any other conclusion could be justified), it should accept the legislative judgment embodied in section 251 of the Act, including the judgment that this provision is so critical that the Commission has no discretion to forbear from its enforcement until it has been fully implemented.

V. UNIVERSAL SERVICE IMPLICATIONS

Under Commission rules, ILECs contribute to the universal service fund based on the revenues associated with DSL services and other telecommunications services provided to their Internet operations. The ILECs are required to contribute because (1) the *Computer II* rules require the ILECs to unbundle the underlying DSL telecommunications and provide it to both affiliated and unaffiliated ISPs at tariffed rates, and (2) the revenues from that telecommunications service are "interstate end user telecommunications revenues" subject to the contribution obligation.

Given that the ILECs' contribution obligation is a consequence of the ILECs' *Computer II* unbundling requirements, and given that there is no basis for the

[232] *See* 47 U.S.C. § 160 (FCC may not forebear from enforcing section 251 until fully implemented).

Commission to eliminate or modify the *Computer II* rules, the only universal service issue that the Commission need address at this time is that raised in CC Docket No. 96-45, whether the ILECs and other carriers should contribute to the universal service fund under the current revenue-based scheme or under a connections-based approach.

Elimination of the *Computer II* unbundling obligation, however, would not only cripple broadband Internet access competition, as discussed above, but also would have far-reaching implications for the universal service system. Under current rules, elimination of the *Computer II* unbundling obligation for broadband Internet access services would also exempt the ILECs from the universal service contribution obligation associated with those services.[233] Not only would there be an immediate reduction in the contribution base, but the impact on the contribution base would only grow as the ILECs acted on their incentive to expand the scope of services offered through the contribution-exempt Internet platform. Moreover, exempting the ILECs from contributing to the universal service fund would be contrary to the *Universal Service Order*'s competitive neutrality principle. While ILEC ISPs would not contribute to the fund, non-facilities-based ISPs would still contribute to the fund, indirectly through rates paid to telecommunications carriers. The Commission's proposal therefore would artificially and improperly encourage integrated carriers such as the ILECs over non-integrated carriers such as Covad.

Although the Commission could find that it is in the public interest to require ILEC ISPs to contribute to the universal service fund, based on the ILEC ISPs' provision

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[233] *Universal Service Report to Congress* ¶ 69.

of interstate telecommunications to themselves,[234] the use of the section 254(d) permissive authority to reach ILEC ISPs carries substantial risks. In particular, that approach risks the eventual imposition of universal service obligations on all information service providers, a result that the Commission has until now wisely sought to avoid.

Moreover, the imposition of a contribution obligation on ILEC ISPs faces implementation hurdles, particularly under the current revenue-based approach. As the Commission has recognized, "there are significant operational difficulties associated with determining the amount of [] an Internet service provider's revenues to be assessed for universal service purposes and enforcing such requirements."[235] Among other things, the Commission would face the challenge of ensuring that its methodology for assessing ILEC ISP revenues complied with the *Universal Service Order's* competitive neutrality principle, *i.e.*, did not "unfairly favor" the ILECs over other carriers or non-facilities-based information service providers.[236]

CONCLUSION

For the foregoing reasons, the Commission should confirm that the ILECs must comply with their unbundling and nondiscrimination obligations under both the *Computer Inquiry* rules and Congress' Title II requirements, and should find that broadband transmission services are common carrier telecommunications services whether or not the ILEC is providing those services to itself or to its ISP affiliate.

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[234] 47 U.S.C. § 254(d).

[235] *Universal Service Report to Congress* ¶ 69.

[236] *In re Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776, ¶ 47 (1997).

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